1990

State of Utah v. Foster M. Leonard : Petition for Rehearing

Utah Court of Appeals

Jay Fitt; Attorney for Respondent.
R. Paul Van Dam; Attorney General; Marian Decker; Assistant Attorney General; Attorneys for Petitioner.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Petitioner,	:	Case No. 900560-CA
v.	:	
FOSTER M. LEONARD,	:	Priority No. 2
Defendant/Respondent.	:	

PETITION FOR REHEARING

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STATEMENT OF ISSUES PRESENTED ON PETITION FOR REHEARING

The issues presented in this petition for rehearing are (1) whether this Court's apparent characterization of the officers' "open view" observations as a "search" in need of constitutional justification was erroneous, and (2) whether this Court erroneously set forth the plain view exception to the warrant requirement as an additional justification for the warrantless search of defendant's vehicle.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies is included in the body of this brief.

STATEMENT OF THE CASE

Defendant, Foster M. Leonard, was charged with two counts of possession of a controlled substance (ephedrine and hidrotic acid), second degree felonies, in violation of Utah Code Ann. § 58-37c-4(b) (Supp. 1991); possession of equipment with intent to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37c-8 (Supp. 1991); conspiracy to manufacture a controlled substance,

(methamphetamine), a third degree felony, in violation of Utah Code Ann. §§ 58-37-8 (Supp. 1991) and 76-4-201 (1990); and giving false information to a police officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (Supp. 1991) (Record [hereinafter R.] 12-13).

Following the trial court's denial of his motions to suppress evidence, defendant entered a conditional plea of guilty to the charges of possession of equipment with intent to manufacture a controlled substance and conspiracy to manufacture a controlled substance, as third degree felonies, in violation of Utah Code Ann. § 58-37c-8 (Supp. 1991) and Utah Code Ann. §§ 58-37-8 (Supp. 1991) and 76-4-201 (1990) (R. 44, 51, 65, 113-21 (motions to suppress), 151-58 (statement of defendant), 108-12 (trial court's ruling)).

Defendant was subsequently sentenced to not more than five years on each count and ordered to pay a $1,000 fine on each count, sentences to run concurrently (R. 189-87).

On appeal, this Court affirmed defendant's conviction. State v. Leonard, No. 900560-CA (Utah App. Dec. 5, 1991).

STATEMENT OF THE FACTS

For purposes of this petition, this Court's statement of the facts is generally sufficient. See State v. Leonard, No. 900560-CA, slip op. at 1-3 (Utah App. Dec. 5, 1991) (a copy of the opinion is attached as Addendum A).

SUMMARY OF ARGUMENT

The "open view" or "plain sight" observations of investigating officers did not constitute a search in the constitutional sense of that term and thus did not require justification pursuant to any exception to the warrant requirement of the fourth amendment. The subsequent entry into defendant's vehicle for purposes of seizing contraband, however, was justified by the automobile exception to the warrant requirement, which is the sole exception to that requirement applicable here. This Court's footnote to the main opinion, setting forth the plain view doctrine as additional justification for the warrantless search of or entry into defendant's vehicle is erroneous as that doctrine has no application to the instant facts. Thus, due to the great potential for confusion by law enforcement looking to this Court for guidance as to permissible conduct in this sensitive area of the law, the State asks this Court to modify footnote 11 and omit the erroneous and superfluous dicta pertaining to the plain view doctrine.

INTRODUCTION

A petition for rehearing is appropriate when the Court has either "misapplied or overlooked [law] which materially affects the result." See Cummins v. Nielson, 42 Utah 157, 172-73, 129 P. 619, 624 (1913). The argument portion of this brief will demonstrate that the State's petition for rehearing is properly before the Court and should be granted.

ARGUMENT

THE "OPEN VIEW" OBSERVATIONS OF INVESTIGATING OFFICERS DID NOT CONSTITUTE A SEARCH IN THE CONSTITUTIONAL SENSE OF THAT TERM AND THUS DID NOT REQUIRE JUSTIFICATION PURSUANT TO ANY EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT; MOREOVER, THE PLAIN VIEW DOCTRINE IS NOT TRIGGERED BY THE FACTS OF THIS CASE AND DOES NOT SERVE AS AN ADDITIONAL JUSTIFICATION FOR THE WARRANTLESS ENTRY OF DEFENDANT'S VEHICLE.

The State acknowledges that this Court affirmed defendant's third degree felony convictions for possession of equipment with intent to manufacture a controlled substance, and for conspiracy to manufacture a controlled substance. See State v. Leonard, No. 900560-CA, slip op. at 1 (Utah App. Dec. 5, 1991). In so doing this Court upheld the warrantless search of defendant's vehicle, correctly applying the automobile exception to the warrant requirement of the fourth amendment. Id. at 12-14. Insofar as this Court's justification for the warrantless search rests upon the automobile exception it is entirely proper; however, in an extraneous footnote, this Court appears to characterize the "open view" or "plain sight" observations of the investigating officers as a warrantless search in the constitutional sense of that term. Id. at 14 n.11. As a result of that characterization, this Court apparently attempts to justify the officers' observations, as well as the subsequent search of defendant's vehicle, under the plain view exception to the warrant requirement of the fourth amendment. Id. It is this, extraneous characterization and application of the plain view exception which proves troubling to the State.

Thus, the issues presented in this petition are (1) whether this Court's apparent characterization of the officers' "open view" observations as a "search" in need of constitutional justification was proper, and (2) whether this Court properly set forth the plain view exception to the warrant requirement as an additional justification for the warrantless search of defendant's vehicle. Due to the great potential for confusion by law enforcement looking to this Court for guidance as to permissible conduct in this sensitive area of the law, the State asks this Court to modify its opinion and omit the erroneous and superfluous dicta contained in footnote 11.

A. Search.

At the outset of the State's analysis it is important to clarify that the sole "search" issue raised by the instant facts is the warrantless entry of defendant's vehicle. Contrary to the apparent reasoning of this Court, the "plain view" observations of Officers Caldwell and Fox, through the windows of defendant's vehicle, did not amount to a "search" in the constitutional sense of that term.[1] State v. Lee, 633 P.2d 48, 50-51 (Utah), cert. denied, 454 U.S. 1057 (1981); State v. Harris, 671 P.2d 175, 179 (Utah 1983).

At this point in the State's analysis, it is helpful to point out a critical distinction between the plain view exception

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[1] Specifically, this Court states that "none of the officers testified that they actually conducted a search of defendant's vehicle, only that they had seen the box containing the Intertech purchase on the back seat." Leonard, slip op. at 14, n.11.

to the warrant requirement of the fourth amendment, to be discussed in greater detail, supra, and the concept of "open view" or "plain sight" discussed here. "'Plain view' is the term uniformly given to the doctrine invoked as justification for seizing evidence without a warrant at the time of an arrest." Lee, 633 P.2d at 51 n.1 (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)); Harris, 671 P.2d at 181 (noting that plain view "never occurs until a lawful search (usually under a warrant) is in progress"). Accord State v. Powell, 99 N.M. 381, 658 P.2d 456, 459-60 (N.M.App.), cert. denied, 99 N.M. 358, 658 P.2d 433 (N.M. 1983); State v. Byerly, 635 S.W.2d 511, 513 (Tenn. 1982), abrogated on other grounds, Horton v. California, ___ U.S. ___, 110 S.Ct. 2301 (1990); State v. Planz, 304 N.W.2d 74, 80 (N.D. 1981). As such, the plain view exception "'authorizes seizure of illegal or evidentiary items visible to a police officer' only if the officer's 'access to the object' itself has a 'Fourth Amendment justification.'" La Fave, Search and Seizure, § 2.2(a) p. 324 (1987 & Supp. 1991) (citing Illinois v. Andreas, 463 U.S. 765 (1983)).

"'Open view' or 'plain sight,'" on the other hand, are the non-search terms appropriately used to describe the lawful observations of the investigating officers discussed here, and to distinguish those observations from the plain view doctrine. Lee, 633 P.2d at 50 n.1.[2] "It has long been the law that

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[2] The Lee Court noted that considerable confusion may be engendered, where, as may have happened in this case, the same term is used to describe the two very different concepts. Id.

objects falling within the plain view of an officer from a position where he is entitled to be are not the subject of an unlawful search." Lee, 633 P.2d at 50-51. As acknowledged by this Court, the initial investigatory stop of defendant's vehicle was supported by a reasonable, articulable suspicion of criminal activity, Leonard, slip op. at 6; thus, the officers observations were made from a position they were lawfully entitled to be. Lee, 633 P.2d at 50-51. Where, as here, an officer approaches a legitimately stopped vehicle, "[he] is not expected to ignore what is exposed to observation from a position where he is lawfully entitled to be, and he may view the interior of a vehicle from such a position." Id.; Harris, 671 P.2d at 179 ("It is well established law that a government official does not engage in a search within the meaning of the Fourth Amendment if he observes incriminating evidence from a place where he has a right to be."). Therefore, insofar as this Court appears to characterize the officers' observations as a "search" needing constitutional justification, that characterization is erroneous.

B. Justification for Warrantless Entry.

Given the validity of the stop and the open view, non-search observations of the officers, it remains for the State to justify the subsequent entry and seizure of contraband from inside defendant's vehicle. Contrary to the reasoning of this Court, Leonard, slip op. at 14 n.11, the officers' entry into

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See also La Fave, Search and Seizure, § 2.2(a) pp. 323-25 (1987 & Supp. 1991).

defendant's vehicle cannot be justified solely by their observations of contraband from outside the vehicle. Although the officers viewing was entirely proper and contributed toward establishing probable cause for the subsequent vehicle search, absent exigent circumstances, the officers were not authorized to make a warrantless entry into defendant's vehicle (a constitutionally protected area), for purposes of seizing contraband. Harris, 671 P.2d at 179; Lee, 633 P.2d at 50; State v. Menke, 787 P.2d 537, 543 (Utah App. 1990). As noted by the Utah Supreme Court in Harris:

> probable cause alone is never enough to search for and seize contraband without a warrant. If it were, the protection of the Fourth Amendment would be rendered a nullity and probable cause alone would make all warrantless searches per se reasonable. Absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional, even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.

671 P.2d at 179 (citations omitted).

The instant warrantless search of defendant's vehicle, i.e., the officers entry into the vehicle, was justified by the exigent circumstances inherent in the automobile exception to the warrant requirement of the fourth amendment. See La Fave, Search and Seizure, § 7.5(a) pp. 128-29 (1987) (noting that the warrantless search of vehicles on probable cause has been upheld even absent true exigent circumstances under the automobile exception). Accordingly, the State argued the applicability of the automobile exception in its responsive brief (a copy of which

is attached as Addendum B), and this Court correctly articulated that exception as justification for the warrantless vehicle search, holding in part as follows:

> Thus, where as here, a vehicle is lawfully stopped based on a reasonable suspicion of criminal activity, a warrantless search is justified where the officers have probable cause to believe contraband is contained in the vehicle. . . . Reviewing all of the information available to the officers in the present case, we hold that there was probable cause to justify the search. Officers Caldwell and Fox both testified that they observed drug paraphernalia and chemicals in plain view in the vehicle.

Leonard, slip op. at 13-14.

However, upon determining that the warrantless vehicle search was justified by the automobile exception, this Court went on to suggest that the testimony of Officers Fox and Caldwell "raises an interesting question in that none of the officers testified that they actually conducted a search of defendant's vehicle, only that they had seen the box containing the Intertech purchase on the back seat." Id. at 14 n.11. This Court then proceeded to observe that "a second exception to the warrant requirement of the Fourth Amendment is the plain view exception," and, relying on State v. Holmes, 774 P.2d 506, 510 (Utah App. 1989), asserted that that exception is properly applicable to the instant facts:

> Determining whether the plain view exception applies requires application of a three-pronged test: (1) the officer's presence must be lawful; (2) the evidence must be in plain view; and (3) the evidence must clearly be incriminating.

> It is clear that in the present case, the officers' presence was lawful. We have already established there was reasonable suspicion to stop defendant's vehicle. It is also clear from the record that the box containing the glassware and chemicals was clearly visible in the back seat of the vehicle. As for the third prong, "clearly incriminating" has been defined as "probable cause to associate the property with criminal activity." In this case, there is evidence to suggest that the contents of the box were associated with criminal activity because all of the items purchased are used in the manufacture of illegal substances, and are rarely purchased in combination for any other purpose. Thus, all of the requirements for the plain view exception are satisfied.

Id. at 14 n.11 (citations omitted). To the extent that footnote 11 suggests that the plain view exception somehow justifies the officers entry into defendant's vehicle, it is erroneous and reflects a basic misunderstanding of the plain view doctrine. See Coolidge v. New Hampshire, 403 U.S. 443 (1971); Lee, 633 P.2d at 51, n.1; Harris, 671 P.2d at 179; Menke, 787 P.2d at 543.

As noted previously, the plain view exception is primarily a seizure doctrine with exclusive reference

> to the legal justification - the reasonableness - for the seizure of evidence which has not been particularly described in a warrant and which is inadvertently[3] spotted in the course of a constitutional search already in progress or in the course of an otherwise justifiable intrusion into a constitutionally protected area. It has no applicability when the vantage point from which the 'plain view' is made is not within a constitutionally protected area.

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[3] The United States Supreme Court recently held that inadvertence is not a necessary condition of a legitimate plain view seizure. Horton v. California, ___ U.S. ___, 110 S.Ct. 2301 (1990).

State v. Scales, 13 Md.App. 474, 284 A.2d 45, 47 n.1 (Md.Ct.Spec.App. 1971). See also Lee, 633 P.2d at 51 n.1; Harris, 671 P.2d 175, 181 (noting that plain view "never occurs until a lawful search (usually under a warrant) is in progress"). Accord Powell, 658 P.2d at 459-60; Byerly, 635 S.W.2d at 513; Planz, 304 N.W.2d at 80. Thus, contrary to this Court's assertion, Leonard, slip op. at 14 n.11, the plain view exception is inapplicable "until there has been a valid 'intrusion' into a constitutionally protected area." Planz, 305 N.W.2d at 80. It is not, as suggested by this Court, a justification for the initial intrusion. Id. Were it otherwise, law enforcement officials could arguably use the plain view exception to "bootstrap themselves into an exploratory search until they find what they are looking for." Harris, 671 P.2d at 181. The Harris court further stressed that "'[a]ny evidence will be in plain view, at least at the moment of seizure.'" Id. But, the "'plain view' doctrine comes into play only where the observation made is postintrusive. Preintrusive observations merely give rise to probable cause." Id.

Thus, based on the foregoing analysis, the plain view doctrine has no application in this case, nor was it properly applied in Holmes, for its most basic requirement cannot be met in either case. Specifically, the presence of law enforcement officers on the public highways outside the legitimately stopped vehicles in Holmes, as well as this case, simply cannot be characterized as an intrusion, lawful or otherwise, into a

constitutionally protected area, which intrusion is necessary to trigger application of the plain view doctrine. Harris, 671 P.2d at 181. Thus, Holmes, because it application of the plain view doctrine was incorrect, offers no valid support for this Court's application of the plain view doctrine to the facts of this case.[4]

CONCLUSION

Based on the foregoing argument, this Court should modify its opinion and omit the erroneous and superfluous dicta contained in footnote 11 thus limiting justification for the warrantless search, i.e., entry into defendant's vehicle, solely to the automobile exception to the warrant requirement of the fourth amendment. Application of the plain view doctrine in this case, as in Holmes, is erroneous and will serve only to confuse law enforcement looking to this Court for guidance as to permissible conduct in this sensitive area of the law.

The State certifies that this petition is presented in good faith and not for delay.

RESPECTFULLY submitted this 18th day of December, 1991.

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[4] The Court's erroneous reasoning in Holmes is perhaps best explained by the fact that Holmes argued the application of the plain view exception in her brief to this Court, asserting that the contraband there was unlawfully seized pursuant to the plain view exception because it was not clearly incriminating (a copy of Holme's brief on appeal is attached as Addendum C).

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing petition for Rehearing were mailed, postage prepaid, to Jay Fitt, attorney for appellant, 835 East 1400 South, Orem, Utah 84058, this 19th day of December, 1991.

Marian Decker

ADDENDA

ADDENDUM A

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee,	)	OPINION (For Publication)
v.	)	Case No. 900560-CA
Foster Leonard, Defendant and Appellant.	)	F I L E D (December 5, 1991)

Fourth District, Utah County
The Honorable George E. Ballif

Attorneys: Jay Fitt, Orem, for Appellant
R. Paul Van Dam and Marian Decker, Salt Lake City, for Appellee

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Before Judges Jackson, Orme, and Russon.

JACKSON, Judge:

Defendant Foster Leonard appeals from his conviction for possession of equipment with intent to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37C-8 (1990), and for conspiracy to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. §§ 76-4-201 (1990) and 58-37-8 (1990). We affirm.

BACKGROUND

From approximately May 1, 1989, to when the present facts occurred, law enforcement agencies had been conducting surveillance at Intertech Chemical in Orem, Utah. The surveillance had resulted in several arrests and convictions relating to the possession and manufacture of controlled substances, specifically methamphetamine. On July 20, 1989, Police Officer Terry Fox was conducting surveillance at Intertech. He noticed defendant and April Garza in the parking lot. Both were dressed in clothing "not typical of

business[people]," and looked nervous. Defendant went into Intertech and came out carrying a box of what appeared to be glassware and chemicals. Defendant loaded the box into a Ford Bronco, and drove away from the parking lot with Garza. Fox decided to follow the vehicle in order to identify its owner.

As Fox proceeded out of the parking lot in his unmarked vehicle, a Datsun truck swerved in front of him. Fox testified that he thought the driver of the Datsun was trying to block him from pursuing defendant's vehicle. Fox continued to follow defendant, who drove recklessly onto the freeway. Defendant's vehicle accelerated to over seventy miles per hour and made several illegal lane changes, according to Fox. Fox also observed defendant putting bandanna-type flags out both windows of the Bronco, apparently to signal the occupants of the Datsun. Fox attempted to find out who owned the vehicle he was pursuing, but the police dispatcher found no owner registered for the license plates on defendant's vehicle. The Datsun similarly had no registered owner.

Fox testified that he decided to stop defendant for the traffic violations he had witnessed. Thinking that he might be in danger, Fox called for assistance. Three other police officers eventually assisted Fox in stopping defendant. One of those, Detective Gary Caldwell, learned from Intertech that defendant and his companion had purchased glassware and a chemical. None of the items purchased were controlled substances, but all were commonly used in the manufacture of methamphetamine. Caldwell testified that he made the decision to stop the vehicle based on his belief that defendant was in possession of drug paraphernalia and controlled substances.

When defendant's vehicle was pulled over, the officers had defendant and Garza get out of the vehicle and kneel down on the side of the freeway. Under Caldwell's direction, Officer Sean Greening placed Garza in his vehicle and asked her name, address, and birthdate. Garza produced an Oregon driver's license. Greening testified that he also advised Garza she did not have to answer his questions. Garza asked why she was being stopped, to which Greening replied "for possession of drug paraphernalia." Garza then explained to Greening that someone had paid her and defendant to purchase the items, and that they were to deliver the items to a motel room.

Meanwhile, Caldwell asked defendant for a driver's license and vehicle registration. Defendant had no identification and told Caldwell the vehicle belonged to Garza. Defendant then gave

Caldwell the name "Scott Leonard" and a birthdate which was later determined to be false. Caldwell testified he advised defendant of his constitutional rights and defendant consented to answering some questions. Caldwell then proceeded to question defendant as to what he was doing in Utah County. Defendant told Caldwell that he had come to Utah County to purchase the items for someone, and that he could not tell Caldwell who that was, because defendant would get in trouble. Caldwell also testified that he could see a box in the back of the Bronco, and that the box contained the items Intertech had told him defendant had purchased.

Because the stories given by defendant and Garza were different, and because he knew what items defendant had purchased at Intertech, Caldwell arrested defendant and Garza. Defendant and Garza were transported to the American Fork Police Department and both were questioned by Caldwell. Eventually Caldwell determined the exact address of the apartment which defendant and Garza shared, and a search warrant of the premises was obtained, based on Caldwell's affidavit.

Defendant moved to suppress the evidence found in the warrantless search of the Bronco and in the warrant search of his apartment, claiming that the officers did not have probable cause to initiate the stop of his vehicle. The trial court denied his motion. Defendant then entered a conditional plea of guilty pursuant to this court's decision in State v. Sery, 758 P.2d 935, 938 (Utah App. 1988), and this appeal followed.

Before this court, defendant appeals the denial of his motion to suppress, claiming that the evidence was illegally obtained. Specifically, defendant claims that his arrest was not based on probable cause; that the search of the Bronco was not based on probable cause; and that the search of his residence was tainted by the illegality of the arrest.

STANDARD OF REVIEW

Our review of findings of fact underlying a trial court's decision on a motion to suppress is governed by the "clearly erroneous" standard, State v. Grovier, 808 P.2d 133, 133 (Utah App. 1991), because the trial court is in an advantageous position to determine the factual basis underlying such a motion. "The trial court's finding is clearly erroneous only if it is against the clear weight of the evidence . . . ." State v. Sery, 758 P.2d 935, 942 (Utah App. 1988).

LEGALITY OF THE INITIAL STOP

The Fourth Amendment to the United States Constitution requires that all seizures of an individual be based on probable cause.[1] The United States Supreme Court first explicitly permitted a seizure of an individual upon less than probable cause in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). The Terry Court held that a police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21, 88 S. Ct. at 1880. The reasonable suspicion standard is codified at Utah Code Ann. § 77-7-15 (1990):

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or attempting to commit a public offense and may demand his name, address and an explanation of his actions.

"Stressing that each case must be decided upon its own facts, the Terry court concluded that the limited stop and frisk was justified where 'a police officer observes unusual conduct which leads him reasonably to conclude in light of his [or her] experience that criminal activity is afoot . . . .'" State v. Sery, 758 P.2d 938, 941 (Utah App. 1988) (quoting Terry, 392 U.S. at 30, 88 S. Ct. at 1884). Thus, a temporary detention or seizure is justified when there is an articulable suspicion that

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1. The Fourth Amendment to the United States Constitution provides, with our emphasis:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

an individual has committed or is about to commit a crime.[2] See id. (quoting Florida v. Royer, 460 U.S. 491, 498, 103 S. Ct. 1319, 1324 (1983) (plurality opinion)). This court has further refined the Terry reasonable suspicion test, concluding that a "brief investigatory stop must be based on 'objective facts' that the 'individual is involved in criminal activity.'" State v. Holmes, 774 P.2d 506, 508 (Utah App. 1989) (citations omitted).

The State argues that several facts support the conclusion that the officers in the present case had a reasonable suspicion that criminal activity was afoot, and that therefore the stop of defendant was justified. Intertech had been under surveillance for selling drug paraphernalia; defendant's behavior was suspiciously inconsistent with that of a legitimate businessman; defendant purchased several items from Intertech which are commonly used in the manufacture of methamphetamine; defendant

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2. Of course, no suspicion is required when a police officer merely makes an inquiry of an individual in the context of a wholly voluntary encounter. The Utah Supreme Court has determined that there are three levels of police-citizen encounters, each of which requires a different degree of justification to be constitutionally permissible:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will;
> (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop";
> (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (per curiam) (quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)). "The stopping of a vehicle and the consequent detention of its occupants constitute a level two 'seizure' within the meaning of the fourth amendment, even if the purpose of the stop is limited and the resulting detention brief." State v. Steward, 806 P.2d 213, 215 (Utah App. 1991) (citing State v. Sierra, 754 P.2d 972, 975 (Utah App. 1988)). In our case, it is not disputed that a level two stop occurred.

left Intertech in an unregistered vehicle; some person in a Datsun tried to prevent the officers from pursuing defendant; defendant displayed bandannas from the windows of his vehicle in an apparent attempt to signal the occupants of the Datsun; and defendant drove erratically and illegally on the freeway, apparently engaging in evasive tactics.[3]

We agree that there was an articulable suspicion which justified the stop of defendant's vehicle, and that therefore the level two seizure of defendant was reasonable.[4] While defendant contends that the officers had no evidence that a crime had been committed, we note that the officers were not only entitled, but probably required, to obtain more information when they reasonably suspected a crime had been committed. See State v. Folkes, 565 P.2d 1125, 1127 (Utah), cert. denied, 434 U.S. 971, 98 S. Ct. 523 (1977); Holmes, 774 P.2d at 508. We hold, therefore, that defendant was constitutionally stopped and briefly detained, and that the trial court's determination that the requisite reasonable suspicion existed was not clearly erroneous.

ARREST OF DEFENDANT AND SEARCH OF VEHICLE

Having determined that the initial seizure of defendant was lawful, we must determine if the subsequent arrest and search were lawful. Defendant argues that the police officers lacked probable cause to arrest him, or to conduct a warrantless search of the vehicle in which he was riding. The trial court found that the arrest of defendant was based on probable cause because the chemicals and equipment found in the vehicle were commonly

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3. The State also lists as support for the contention that the stop of defendant was based on a reasonable suspicion, several facts which occurred after defendant had been stopped. Of course, only facts known to the officers at the time they stopped defendant's vehicle are relevant. See State v. Baird, 763 P.2d 1214, 1217 (Utah App. 1988). See also State v. Mendoza, 748 P.2d 181, 183 (Utah 1987).

4. While Fox testified that he originally planned to stop defendant for traffic violations, it is clear from the record that Caldwell, who took charge of the situation once he was contacted by Fox, stopped defendant's vehicle for the purpose of ascertaining who defendant was, and for what purpose the glassware and chemicals had been purchased from Intertech.

used together in the manufacture of methamphetamine, and because testimony revealed that only one specialized piece of glassware and some chemicals were lacking to make the illegal substance. As to the search of defendant's vehicle,[5] the trial court found that there was probable cause based on the list of items purchased from Intertech received while the officers were in pursuit, the suspicious behavior of defendant, and "all attendant circumstances."[6] However, the court's ruling does not indicate which exception to the warrant requirement of the Fourth Amendment it was relying upon in justifying the warrantless search.

The Arrest

As to the legality of the arrest, Utah Code Ann. § 77-7-2 (1990) provides authority for peace officers to make an arrest with or without a warrant. Reasonable cause for arrest without a warrant was defined by the Utah Supreme Court in State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1259 (1972): "The determination should be made on an objective standard: whether

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5. We refer to the vehicle which defendant was driving as "defendant's vehicle," but we note that the vehicle actually belonged to passenger Garza.

6. The State does not argue that defendant, because he was not the owner of the vehicle, has no standing to challenge the search of the vehicle. Therefore, we do not reach the question of whether defendant had a legitimate expectation of privacy in the vehicle.

Prior to State v. Schlosser, 774 P.2d 1132 (Utah 1989), our supreme court never required the issue of standing to be raised by the parties in the trial court or on appeal. "Standing is an issue that a court can raise sua sponte at any time." State v. Tuttle, 780 P.2d 1203, 1207 (Utah 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 1323 (1990). Rather, that court reached the issue regardless of whether or not a party had raised it. See State v. Constantino, 732 P.2d 125, 126-27 (Utah 1987) (per curiam); State v. Valdez, 689 P.2d 1334, 1335 (Utah 1984); State v. Purcell, 586 P.2d 441, 443 (Utah 1978). In Schlosser, however, the court held that standing to challenge the validity of a search is not a jurisdictional doctrine, and, as such, that issue is waived if not raised before the trial court by the parties. Schlosser, 774 P.2d at 1138-39. But see Schlosser, 791 P.2d at 1139-41 (Howe, J., dissenting) (two justices would sua sponte raise issue of standing).

from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense." Id. at 1260 (citations omitted). See also State v. Ayala, 762 P.2d 1107, 1111 (Utah App.), cert. denied, 773 P.2d 45 (Utah 1989).

The arresting officer, Caldwell, testified that he questioned defendant regarding his presence in Utah County and the purchase from Intertech. Only after defendant gave a false name and birthdate, could provide no plausible explanation for the purchase, and would not tell Caldwell who had paid him to make the purchase, did Caldwell effectuate an arrest.

These facts, taken together with the evasive tactics engaged in by defendant when the officers were pursuing him, the fact that the officers knew exactly what defendant had purchased from Intertech based on the list of items received while in pursuit, and the fact that the items found in defendant's vehicle were commonly used together in the manufacture of methamphetamine, warranted arresting defendant. Accordingly, we cannot say that the trial court's finding of probable cause was an erroneous one.

The dissent takes issue with the tactics employed by the officers in effectuating a level two stop, concluding that a de facto arrest actually occurred. Admittedly, if defendant had been arrested immediately upon being stopped by the officers, probable cause would have to be established at that point, and not after Caldwell interviewed defendant. While many courts have addressed the issue of when a seizure occurs,[7] the cases are less clear on when an arrest occurs. The United States Supreme Court has acknowledged that it is sometimes difficult to distinguish an investigative stop from a de facto arrest. See United States v. Sharpe, 470 U.S. 675, 685, 105 S. Ct. 1568, 1575 (1985). There

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7. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 1877 (1968). See also Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 216-17, 104 S. Ct. 1758, 1763 (1984) (intimidating circumstances surrounding police questioning result in Fourth Amendment seizure); United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980) (person is seized when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

is no "litmus-paper test for . . . determining when a seizure exceeds the bounds of an investigative stop[,]" Florida v. Royer, 460 U.S. 491, 506, 103 S. Ct. 1319, 1329 (1983), and becomes an arrest. Rather, the determination usually depends upon the reasonableness of the stop under the circumstances. Two factors, whether there was a proper basis for the stop, and whether the degree of intrusion was reasonably related to the facts and circumstances at hand, are determinative of reasonableness. Terry, 392 U.S. at 19-20, 88 S. Ct. at 1878-79; United States v. Hardnett, 804 F.2d 353, 356 (6th Cir. 1986), cert. denied, 479 U.S. 1097, 107 S. Ct. 1318 (1987). While the dissent does not dispute there was a reasonable basis for the stop, it does take issue with tactics employed by the officers. In reaching our conclusion that a proper level two stop was effectuated in this case, a review of cases which have addressed this question is useful to illustrate that no arrest took place.

The dissent is correct in acknowledging one exception to the general proscription against intrusive police conduct: police are permitted to use a show of force or other exceptional methods during a Terry stop when such measures are reasonably necessary for the protection and safety of the investigating officers. The mere use or display of force in making a stop will not necessarily convert a stop into an arrest. United States v. Greene, 783 F.2d 1364, 1367 (9th Cir.), cert. denied, 476 U.S. 1185, 106 S. Ct. 2923 (1986); United States v. White, 648 F.2d 29, 34 (D.C. Cir.), cert. denied, 454 U.S. 924, 102 S. Ct. 424 (1981). See also Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972) (police officers making a reasonable investigatory stop should not be denied the opportunity to protect themselves from possible attack); United States v. Lego, 855 F.2d 542, 545 (8th Cir. 1988) (officer can point a gun at suspect without transforming investigative stop into arrest); United States v. Trullo, 809 F.2d 108, 113 (1st Cir.) (because "officer suspected appellant of dealing in narcotics, a pattern of criminal conduct rife with deadly weapons," display of weapon justified), cert. denied, 482 U.S. 916, 107 S. Ct. 3191 (1987); United States v. Eisenburg, 807 F.2d 1446, 1451 (8th Cir. 1986) (experienced police officers acted reasonably in drawing weapons in investigative stop of suspected narcotics dealer).

We recognize that the officers' conduct, ordering defendant to kneel at the side of the road, was intrusive.[8] If weapons were drawn, the conduct is even more intrusive.[9] Certainly such conduct would not be warranted if the surrounding circumstances did not give rise to a justifiable fear for personal safety. United States v. Hardnett, 804 F.2d 353, 357 (6th Cir. 1986). However in this case, there was justification. While the dissent acknowledges that certain situations merit officers approaching a suspect with their weapons drawn, or ordering a suspect to lie on the ground, the dissent argues that in this case, such actions were not warranted because the police never determined whether defendant had a weapon, and there was no indication that defendant was dangerous. However, that conclusion is based on faulty assumptions.

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8. Focusing on whether or not requiring a driver to step out of his or her vehicle exceeds the scope of a Terry stop, the Supreme Court has concluded that "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330 (1977). See also United States v. Lego, 855 F.2d 542, 545 (8th Cir. 1988) (officer's confining suspect in police car within scope of investigative stop); United States v. Manbeck, 744 F.2d 360, 377-78 (4th Cir. 1984) (upholding reasonableness of investigative stop where police ordered the suspect to take a seat in the police car), cert. denied, 469 U.S. 1217, 105 S. Ct. 1197 (1985). Also, as the dissent points out, police may require a suspect to lie on the ground. See, e.g., United States v. Buffington, 815 F.2d 1292, 1300 (9th Cir. 1987).

9. There is nothing in the record that supports the dissent's conclusion that defendant was not violent or armed. In fact, quite the opposite can be assumed given the facts recited above. On similar facts, the Ninth Circuit Court of Appeals held that it was reasonable to assume that a suspected narcotics dealer was armed and dangerous. United States v. Salas, 879 F.2d 530, 535 (9th Cir.) (erratic and evasive driving by defendants and reports of drug materials in defendants' motel room gave police reasonable suspicion that defendants were armed), cert. denied, 493 U.S. 979, 110 S. Ct. 507 (1989); see also United States v. Post, 607 F.2d 847, 851 (9th Cir. 1979) ("[i]t is not unreasonable to assume that a dealer in narcotics might be armed").

First, the record does not indicate whether or not defendant was frisked. Two of the officers who testified gave different accounts of what transpired after defendant's vehicle was stopped.

Second, the record does indicate that the officers thought defendant was dangerous and could be carrying a weapon. Officer Fox testified that he became fearful when bandannas were put outside the windows of defendant's car. He decided to call for back-up officers to stop defendant's car when the bandannas appeared, and when he saw the cream-colored Datsun following him. "I felt it was a chase car, an assistance car," Fox testified, "and I was again fearful that I needed to have enough help to stop this vehicle so I wouldn't get hurt." In addition, Fox stated that when he sees an unregistered vehicle, he immediately gives it more caution. Officer Greening, who also testified at the suppression hearing, stated that he was called to assist in a stop for drug paraphernalia, and that he has been informed in past circumstances that "these people could be dangerous, and thats why [he] was there to assist." Greening went on to say that officers, including himself, were often called to assist on DUI's and regular traffic stops, and "whenever an officer may feel he is in danger," and that it was his belief in dealing with people who were involved with drugs that "[t]hey have been convicted criminals and in the possession of firearms." We find abundant support in the record that the officers believed defendant could be armed or dangerous, and not, as the dissent suggests, that the police had nothing more than a hunch that defendant might be dangerous. Therefore, the officers' actions were not unreasonable to insure their safety.

The dissent points to defendant being read his Miranda rights as further indication that an arrest took place. In Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984), the Supreme Court held that Miranda warnings were not required when a defendant is subjected to questioning during a routine traffic stop. The Court pointed to the circumstances around a traffic stop and compared them to stationhouse interrogation, "which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." Id. at 448, 104 S. Ct. at 3149 (citations omitted). Given that traffic stops occur in public, and that they are relatively brief, the Court concluded that "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda." Id. at 440, 104 S. Ct. at 3150. The Court, however, also noted that police "could ensure compliance with the law by giving the full Miranda

warnings." Id. at 431 n.13, 104 S. Ct at 3145-46 n.13.[10] That is exactly what took place here.

In the present case, defendant was detained briefly on the side of the highway. The officers interrogated defendant. Defendant was arrested after he gave the officers false information, and had no plausible explanation for the Intertech purchase. Given the circumstances facing the officers, we conclude that they pursued their investigation in a diligent and reasonable manner, and that the methods employed were not excessive.

The Search

Admittedly, the search of defendant's vehicle conducted without a warrant is unreasonable per se unless it falls within a recognized exception to the warrant requirement. See State v. Bartley, 784 P.2d 1231, 1235 (Utah App. 1989). The State, acknowledging that the trial court did not rely upon a specific exception, claims that the search was justified pursuant to the automobile exception.

While an individual has a lesser expectation of privacy in a vehicle as opposed to in his or her home, the protection of the Fourth Amendment still applies. See State v. Schlosser, 774 P.2d 1132, 1135 (Utah 1989) (citing California v. Carney, 471 U.S. 390-93, 105 S. Ct. 2066, 2068-70 (1985)). In Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925), the Supreme Court determined that a warrantless search of an automobile was

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10. In United States v. Bautista, 684 F.2d 1286 (9th Cir. 1982), the Ninth Circuit Court of Appeals held that while officers are not required to give Miranda warnings every time they question a suspect, "Miranda warnings are necessary even during a Terry stop if the suspect has been taken into custody or if the questioning takes place in a police dominated or compelling atmosphere." Id. at 1291 (citing United States v. Wilson, 666 F.2d 1241, 1247 (9th Cir. 1982); United States v. Harris, 611 F.2d 170, 172 (6th Cir. 1979)); United States v. Hickman, 523 F.2d 323, 327 (9th Cir. 1975), cert. denied, 423 U.S. 1050, 96 S. Ct. 778 (1976). Compare United States v. Baron, 860 F.2d 911, 914 (9th Cir. 1988) (police exceeded scope of investigative stop by ordering defendant not to touch anything or say anything, and thirty-five minutes later confined her to a small room for questioning), cert. denied, 490 U.S. 1040, 109 S. Ct. 1944 (1989).

permissible if the officers have probable cause to believe the automobile contains either contraband or evidence of a crime and that they may be lost if not immediately seized. Id. at 151-52; see also United States v. Ross, 456 U.S. 798, 806-07, 102 S. Ct. 2157 (1982); Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 1978-80 (1970); United States v. Mendoza, 722 F.2d 96, 100 (5th Cir. 1983); State v. Dorsey, 731 P.2d 1085, 1087-88 (Utah 1986); State v. Christensen, 676 P.2d 408, 411 (Utah 1984); State v. Droneburg, 781 P.2d 1303, 1305 (Utah App. 1989) (citing Carroll, 267 U.S. at 132); State v. Holmes, 774 P.2d 506, 512 n.6 (Utah App. 1989). Thus, where as here, a vehicle is lawfully stopped based on a reasonable suspicion of criminal activity, a warrantless search is justified where the officers have probable cause to believe contraband is contained in the vehicle.

"The determination of whether probable cause exists . . . depends upon an examination of all the information available to the searching officer in light of the circumstances as they existed at the time the search was made." State v. Dorsey, 731 P.2d at 1088 (citing Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311 (1949)). Probable cause for a warrantless search has been found to exist on facts similar to those in the present case. In Mendoza, drug enforcement agents conducted surveillance of a residence, and also followed individuals who had contact with the suspect who resided there. The agents observed several of these individuals driving "in a manner calculated to elude surveillance," Mendoza, 722 F.2d at 101, using pay telephones, and making several trips to and from a warehouse. While the court said that these facts may be consistent with innocent behavior, the totality of the circumstances justified a warrantless search of the suspects' vehicles. Id. at 101-02.

Similarly, in Dorsey, our supreme court upheld a warrantless search of an automobile where a police officer who was assisting other officers involved in an undercover narcotics purchase, followed defendant's truck and eventually stopped him. The court found that because the officer knew that a controlled narcotics purchase had been attempted; that two of the individuals had left the motel room where the negotiations were taking place; that someone involved in the transaction had on a dark leather jacket; and that defendant was wearing a dark leather jacket, probable cause existed. Dorsey, 731 P.2d at 1089.

Reviewing all of the information available to the officers in the present case, we hold that there was probable cause to justify the search. Officers Caldwell and Fox both testified

that they observed drug paraphernalia and chemicals in plain view in the vehicle.[11] The officers also testified that defendant could not explain why he purchased the items, or for whom they were purchased. While the officers' information at the time of the search might not be sufficient by itself to establish guilt, it was sufficient to establish probable cause. See id. Therefore, the trial court's determination that probable cause existed for the search was not erroneous.

VALIDITY OF THE SEARCH WARRANT

Defendant's last claim is that the affidavit in support of the warrant to search his apartment contained nothing from which a detached and neutral magistrate could conclude that the apartment contained evidence of a crime. It is well established that a finding of "probable cause supported by oath or affirmation" is required for the issuance of a search warrant. State v. Brown, 798 P.2d 284, 285 (Utah App. 1990) (citation

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11. This testimony raises an interesting question in that none of the officers testified that they actually conducted a search of defendant's vehicle, only that they had seen the box containing the Intertech purchase on the back seat. Although not briefed or raised by the State, a second exception to the warrant requirement of the Fourth Amendment is the plain view exception. Determining whether the plain view exception applies requires application of a three-pronged test: (1) the officer's presence must be lawful; (2) the evidence must be in plain view; and (3) the evidence must clearly be incriminating. State v. Holmes, 774 P.2d 506, 510 (Utah App. 1989) (citations omitted).

It is clear that in the present case, the officers' presence was lawful. We have already established there was reasonable suspicion to stop defendant's vehicle. It is also clear from the record that the box containing the glassware and chemicals was clearly visible in the back seat of the vehicle. As for the third prong, "clearly incriminating" has been defined as "probable cause to associate the property with criminal activity." State v. Kelly, 718 P.2d 385, 390 (Utah 1986) (quoting Texas v. Brown, 460 U.S. 730, 741-42, 103 S. Ct. 1535, 1543 (1983) (plurality opinion)). In this case, there is evidence to suggest that the contents of the box were associated with criminal activity because all of the items purchased are used in the manufacture of illegal substances, and are rarely purchased in combination for any other purpose. Thus, all of the requirements for the plain view exception are satisfied.

omitted). In reviewing a probable cause determination, a magistrate's decision will be upheld if "the magistrate had a substantial basis for . . . [determining] that probable cause existed." State v. Babbell, 770 P.2d 987, 991 (Utah 1989) (quoting Illinois v. Gates, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332 (1983)).

Contrary to defendant's assertion, the affidavit in this case is sufficient. Taken as a whole, the affidavit establishes that the affiant relied on his own and upon Fox's investigation and observations of defendant's conduct; that defendant had purchased several items which were known to be used in the manufacture of methamphetamine; that defendant gave false information as to where he resided, and when questioned about the Intertech purchase; and that Garza, with whom defendant shared the apartment, and who was arrested at the same time based upon the same facts as defendant, had previously been convicted for conspiracy to manufacture and distribute illegal substances. See State v. Stromberg, 783 P.2d 54, 57 (Utah App. 1989) (probable cause determination supported by fact that defendant has previously been convicted of similar offense), cert. denied, 795 P.2d 1138 (Utah 1990). These facts, taken together, support the trial court's determination that probable cause existed for the issuance of the search warrant.

CONCLUSION

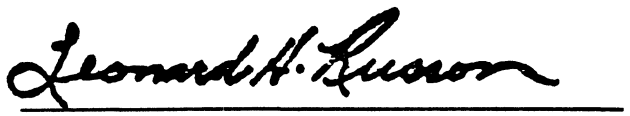
We hold that the stop and subsequent warrantless search of defendant's vehicle, defendant's arrest, and the warrant search of defendant's home did not violate his rights, and therefore, the trial court's decision to deny defendant's motion to suppress the evidence found as a result of those searches was not clearly erroneous. The conviction is affirmed.

Norman H. Jackson, Judge

RUSSON, Judge (concurring in the result):

I concur in the result of the main opinion, but write separately because I prefer a different analytical approach to reach the same result. I would hold that probable cause to arrest Leonard existed at the time at which the officers stopped

Leonard's vehicle. The facts which support probable cause include: (1) evidence that the continuing surveillance had resulted in several arrests and convictions relating to the possession and manufacture of methamphetamine; (2) Officer Fox's observation that Leonard's dress and manner were suspiciously inconsistent with those of a legimate businessman; (3) the Datsun truck's attempt to block Officer Fox from following Leonard; (4) Leonard's evasive driving manner, including driving at excessive speeds and making numerous illegal lane changes; (5) Leonard's apparent attempt to signal the occupants of the Datsun truck by waving bandanna-type flags out the window; (6) Officer Fox's discovery that no owner was registered for the license plates on the vehicle that Leonard was driving; and (7) the fact that Officer Caldwell had learned from Intertech what items had been purchased by Leonard and his companion, in concert with Officer Caldwell's knowledge that the said items are commonly used in the manufacture of methampetamine. On the basis of these facts, I would hold that the officers had probable cause to arrest Leonard when they stopped his vehicle, and that therefore the trial court properly denied Leonard's motion to suppress. Accordingly, I agree that Leonard's conviction should be affirmed.



Leonard H. Russon, Judge

ORME, Judge (dissenting):

In its brief, the State does not contend that there was probable cause to arrest defendant or subject him to anything more intrusive than a level-two Terry stop at the time the police officers effected the stop and asked their initial questions. Accordingly, the debate on appeal was principally directed to whether the police officers possessed the articulable suspicion necessary to justify a level-two encounter. I agree the officers had the requisite articulable suspicion to warrant a level-two stop. It does not follow, however, that what the officers actually effected was a proper level-two stop. Given the intrusive tactics employed by the investigating officers, I believe the main opinion errs in determining that the initial seizure was a level-two stop and not a de facto arrest requiring probable cause.

According to the record, the police officers stopped defendant because they suspected him of committing a non-violent felony--possession of equipment used in the manufacture of controlled substances. There were four police officers present, and three police cars, while only defendant and his female companion occupied the stopped vehicle. The stop occurred along the shoulder of a well-traveled highway, apparently during daylight.[1] At no time prior to the stop had the officers seen defendant or his companion in possession of a weapon, and the record provides no indication that the police had anything more than a pre-stop hunch that defendant might be dangerous. When defendant's vehicle came to a halt on the shoulder of the highway, defendant voluntarily exited the vehicle and walked toward the police cars. There is no evidence that defendant made furtive gestures, carried himself suspiciously, or otherwise approached the police in anything but a cooperative, non-violent manner.[2]

Nonetheless, Officer Fox testified that before questioning defendant, he ordered defendant to kneel down at the side of the highway. The female occupant of defendant's vehicle was placed in one of the police cars. Further, although neither Officer Fox nor Officer Caldwell recalled specifically whether any of the police officers drew their guns at the time they made the stop, Officer Fox claimed it was "very possible" guns were drawn, and Officer Caldwell stated that he "hoped" at least one of the officers had drawn his gun. Finally, Officer Fox testified that before questioning defendant, Officer Caldwell advised defendant of his Miranda rights.

A Terry stop "involves no more than a brief stop, interrogation, and, under the proper circumstances, a brief check for weapons." United States v. Robertson, 833 F.2d 777, 780 (9th

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1. Although the record does not state the time of the stop, other facts--i.e., that, just prior to the stop, officers had been conducting surveillance at a wholesale establishment open for business, and that officers clearly saw bandannas being waved from defendant's vehicle--indicate that the stop took place during daylight hours.

2. It would thus appear that any pre-stop concern the officers had about the potential dangerousness of defendant would have been largely dispelled by his non-confrontational approach. Any lingering concern could have been dispelled by a simple pat down of the sort permitted by Terry.

Cir. 1987). Anything beyond such a brief and narrowly-defined intrusion constitutes a de facto arrest, and probable cause is required. See id.; Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 2254 (1979). The accepted rule is that what might have otherwise been a level-two stop evolves into a level-three de facto arrest when, in view of all the circumstances, a reasonable, innocent person in the suspect's place would believe himself to be under arrest. See United States v. Pinion, 800 F.2d 976, 979 (9th Cir. 1986), cert. denied, 480 U.S. 936, 107 S. Ct. 1580 (1987). See also Florida v. Royer, 460 U.S. 491, 502, 103 S. Ct. 1319, 1326-27 (1983) (characterizing relevant inquiry as whether the suspect believed he was being detained). Accordingly, in the course of a valid Terry stop the police may not, as a matter of routine, utilize methods which might commonly be employed incident to arrest. 3 W. LaFave, Search and Seizure § 9.2(d) at 366 (2d ed. 1987).

There is, however, one exception to this general proscription against intrusive police conduct. Police are permitted to employ a show of force or other exceptional methods during a Terry stop when such measures are reasonably necessary for the protection and safety of the investigating officers.[3]

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3. For situations in which police officers may draw weapons while effecting a stop, see, e.g., United States v. Jones, 759 F.2d 633, 638-39 (8th Cir.) (drawing weapons is permissible part of vehicle stop "if the police action is reasonable under the circumstances," taking into consideration "the number of officers and police cars involved, the nature of the crime and whether there is reason to believe the suspect might be armed, the strength of the officers' articulable, objective suspicions, the erratic behavior of or suspicious movements by the persons under observation, and the need for immediate action by the officers . . . ."), cert. denied, 474 U.S. 837, 106 S. Ct. 113 (1985); United States v. Nargi, 732 F.2d 1102, 1106 (2d Cir. 1984) (display of weapons does not transform stop into arrest when suspected crime is a serious felony and stop was made in an isolated area); United States v. Jacobs, 715 F.2d 1343, 1345-46 (9th Cir. 1983) (drawing weapon acceptable when vehicle's occupant is suspected of bank robbery and is possibly under the influence of drugs, and the police officer is alone).

For situations in which police officers may require a suspect to lay down on the ground, see, e.g., United States v. Laing, 889 F.2d 281, 285 (D.C. Cir. 1989) (when suspect ran toward apartment for which police had a warrant to search for guns and drugs, and suspect put his hand into his pants, it was acceptable for police to force suspect to lie on the floor), cert. denied, 110 S. Ct. 1790 (1990); United States v. Taylor,

(continued...)

However, even then, the investigating officers must employ the least intrusive means reasonably available to effect the purpose of the stop. See Royer, 103 S. Ct. at 1325 (recognizing that, although permissible level of intrusion will vary with circumstances, least intrusive means must always be employed).

I agree that, in the instant case, the State has set forth sufficient facts to support a finding that the police had reasonable suspicion to stop defendant and make a level-two inquiry. However, given the circumstances of the encounter, I do not believe those same facts support a finding that the intrusive methods used by the police were necessary to protect the officers during the stop.[4] The State has provided no additional evidence to justify the officers' conduct.[5] Therefore, on the record before us, I believe the seizure to have been too intrusive to qualify as a level-two stop.[6]

3(...continued)
716 F.2d 701, 709 (9th Cir. 1983) (stop not invalid because police ordered suspect to lie on the floor, when suspect had disobeyed police commands to raise his hands and had made furtive gestures); People v. Chestnut, 51 N.Y.2d 14, 409 N.E.2d 958, 962, 431 N.Y.S.2d 485 (ordering suspect to the floor was permissible when suspect was in company of man whom there was probable cause to arrest for an armed robbery that had just been committed, and police had witnessed a suspicious exchange between that man and the suspect), cert. denied, 449 U.S. 1018, 101 S. Ct. 582 (1980).

4. The officers did not frisk defendant, or otherwise attempt to discern if he was carrying a weapon. This strongly suggests that, once defendant had been stopped and exited his car, the officers did not suspect he was armed. Robertson, 833 F.2d at 781. Other circumstances of the stop--the highway-side locale, the presence of four officers, the non-violent nature of the suspected offense, and defendant's non-furtive attempt to approach the police vehicles--also indicate the situation was not potentially dangerous, and that intrusive tactics were inappropriate.

5. The problem may essentially be a failure by the State, at the trial court, to develop the available evidence so as to meet its burden of proof. Little attention seems to have been given at the evidentiary hearing to what the police did in effecting the stop as opposed to what they knew in deciding to effect the stop.

6. Nonetheless, I might still be willing to view the facts as not moving the case from the level-two to the level-three pigeonhole if, at the time the seizure occurred, a reasonable,
(continued...)

It is the State's burden to show that the seizure it seeks to justify was sufficiently limited to satisfy the conditions of a level-two stop. United States v. Williams, 714 F.2d 777, 781 (8th Cir. 1983) (quoting Royer, 103 S. Ct. at 1325-26). See United States v. Al-Azzawy, 784 F.2d 890, 894 (9th Cir. 1985), cert. denied, 476 U.S. 1144, 106 S. Ct. 2255 (1986). For the reasons discussed above, I believe the State falls short of satisfying that burden. See also note 4, supra. Accordingly, I would hold that the district court erred in determining defendant

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6(...continued)
innocent person in defendant's place would not have believed himself to be under arrest. See United States v. Pinion, 800 F.2d 976, 979 (9th Cir. 1986), cert. denied, 480 U.S. 936, 107 S. Ct. 1580 (1987). I find such a possibility unlikely here. The police converged on defendant in three separate cars. The initial confrontation was somewhat hostile despite defendant's passivity, and may well have included a show of weapons by one or more officers. Defendant was ordered to his knees at the side of the highway, while his female companion was placed in the back of a police vehicle. Defendant was then informed of his Miranda rights. It is unlikely that, at this point in the encounter, a reasonable person in defendant's position would believe his seizure to be less than a level-three custodial one. Other cases have reached the same result in similar circumstances. See, e.g., United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1295 (9th Cir. 1988) (Terry-stop of suspected drug dealers held invalid when police approached with guns drawn, ordered the suspects to lie down in the street, and handcuffed them, since the "show of force and detention used in this context are indistinguishable from police conduct in an arrest"); Kraus v. County of Pierce, 793 F.2d 1105, 1108-09 (9th Cir. 1986) (under circumstances in which police turned spotlights on the suspects, drew their weapons, and ordered the suspects to drop to their knees, a reasonable person would have believed himself to be under arrest), cert. denied, 480 U.S. 932, 107 S. Ct. 1571 (1987).

was subjected to a valid level-two stop, reverse the denial of defendant's suppression motion,[7] and remand with instructions to permit withdrawal of his guilty plea.

Gregory K. Orme, Judge

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7. The evidence seized from the car and from defendant's home is tainted by the illegality of his "arrest" on less than probable cause. Probable cause came into existence only when defendant made incriminating statements when in custody, but such custody was improper where it was supported by nothing more than an articulable suspicion.

ADDENDUM B

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 900560-CA
v.	:	Priority No. 2
FOSTER M. LEONARD,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM CONVICTIONS FOR POSSESSION OF EQUIPMENT WITH INTENT TO MANUFACTURE A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37C-8 (Supp. 1991), AND FOR CONSPIRACY TO MANUFACTURE A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-4-201 (1990) AND 58-37-8 (Supp. 1991), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, THE HONORABLE GEORGE E. BALLIF, PRESIDING.

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v.	:	Priority No. 2
FOSTER M. LEONARD,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for possession of equipment with intent to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37c-8 (Supp. 1991), and for conspiracy to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. §§ 76-4-201 (1990) and 58-37-8 (Supp. 1991). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1991).

STATEMENT OF ISSUES PRESENTED AND STANDARD OF APPELLATE REVIEW

The sole issue on appeal is whether the trial court correctly denied defendant's motion to suppress evidence on the grounds that the investigatory stop of defendants' vehicle was supported by reasonable suspicion, that the subsequent search of defendants' vehicle was proper, that officers provided appropriate Miranda warnings prior to questioning defendants and that the affidavit in support of a search warrant for defendants' residence was sufficient to establish probable cause. Because

the trial court is in the best position to assess witness credibility in a motion to suppress hearing, this Court "will not disturb its factual assessment underlying a decision to . . . deny a suppression motion unless it clearly appears that the lower court was in error." State v. Brown, 798 P.2d 284, 285 (Utah Ct. App. 1990). A trial court's findings are not clearly erroneous unless they are either against the clear weight of the evidence, or this Court reaches a "definite and firm conviction" that the trial court was mistaken. State v. Menke, 787 P.2d 537, 539 (Utah Ct. App. 1990) (citations omitted); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987). However, this Court reviews conclusions drawn from the trial court's fact findings as a matter of law, giving no deference to the lower court's ruling. State v. Cayer, No. 900297-CA, slip op. at 7 (Utah Ct. App. June 25, 1991).

When a search warrant is challenged as having been issued without an adequate showing of probable cause, the reviewing court does not conduct a de novo review of the magistrate's probable cause determination; instead, the reviewing court determines only whether the magistrate had a substantial basis for concluding that probable cause existed. State v. Babbell, 770 P.2d 987, 991 (Utah 1989). The reviewing court should pay "great deference" to the magistrate's decision. Ibid.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies is included in the body of this brief.

STATEMENT OF THE CASE

Defendant, Foster M. Leonard, was charged with two counts of possession of a controlled substance, to wit, ephedrine and hydriodic acid, second degree felonies, in violation of Utah Code Ann. § 58-37c-4(b) (Supp. 1991); possession of equipment with intent to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37c-8 (Supp. 1991); conspiracy to manufacture a controlled substance, to wit, methamphetamine, a third degree felony, in violation of Utah Code Ann. §§ 58-37-8 (Supp. 1991) and 76-4-201 (1990) and giving false information to a police officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (Supp. 1991) (Record [hereinafter R.] at 12-13).

Following the trial court's denial of his motions to suppress evidence, defendant entered a conditional plea of guilty to the charges of possession of equipment with intent to manufacture a controlled substance and conspiracy to manufacture a controlled substance, as third degree felonies, in violation of Utah Code Ann. § 58-37c-8 (Supp. 1991) and Utah Code Ann. §§ 58-37-8 (Supp. 1991) and 76-4-201 (1990) (R. at 44, 51, 65, 113-21 (motions to suppress), 151-58 (statement of defendant), 108-12 (trial court's ruling)).

Defendant was subsequently sentenced to not more than five years on each count and ordered to pay a $1,000 fine on each count, sentences to run concurrently (R. at 189-87).

STATEMENT OF THE FACTS

For purposes of the issues raised on appeal, the pertinent facts are those set out in the trial court's ruling (R. at 108-112).[1] The Court's findings of fact and conclusions of law are as follows:

> [1] From approximately May 1, 1989, law enforcement agencies had been conducting surveillance at Intertech Chemical in Orem[,] Utah. The surveillance has resulted in a number of arrests and convictions. On July 20, 1989, Detective Terry Fox was conducting surveillance at Intertech. He noticed defendant Leonard in the parking lot wearing casual clothes and using what appeared to be a personal vehicle rather than a company vehicle. Leonard behaved in a nervous manner. He purchased what looked to the detective to be glassware and chemicals and appeared to pay in cash. Defendants loaded the glassware and chemicals in to the vehicle and left the parking lot.
>
> [2] Detective Fox decided to follow the vehicle in order to identify its owner. As Fox attempted to follow the vehicle, another car swerved in front of Fox in an apparent attempt to disrupt his progress. It appeared to Fox that the defendants' vehicle was trying to evade pursuit. Fox noted reckless behavior on the part of the defendants as they turned to get on the freeway that nearly caused an accident. On the freeway, the defendants' accelerated to over 70 miles per hour in a 55 miles per hour zone.

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[1] Defendant does not appear to dispute the trial court's findings; rather, defendant challenges the credibility of the officers who testified at the motion to suppress hearing (Br. of App. at 5-6).

[3] Detective Fox called for back up after a check through dispatch found no owner registered for either the plates of the defendants' vehicle nor for the vehicle that swerved in front of him. The vehicle was stopped without incident after the backup arrived.[2] The officers on the scene then arrested the defendants and gave the appropriate Miranda warnings. Defendants were interviewed separately concerning what they had purchased and the purpose for which they had purchased it. They gave the officers different stories--but both indicated that they were purchasing the equipment for someone else. Defendant Leonard at first gave a false identification and date of birth. Over $2,000 was found in defendant Garza's purse.

[4] Prior to the arrest of the defendants and the search of the vehicle, the officers had made contact with Intertech and were told what the defendants had purchased.[3] The items found in the vehicle--including glassware and chemicals--matched the description of the merchandise given by Intertech. The vehicle contained items frequently used in the manufacture of methamphetamine. Defendant Garza gave two different addresses as her own. After checking with Mountain Bell, the officers found that one of the addresses given had a phone listed in her name. Based upon the information given above, a search warrant was

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[2] Based on information provided him by Officer Fox, Officer Gary Caldwell of the American Fork Police Department effected the stop of the defendants' vehicle (T. at 82-90). The stop was based on the officers' belief that defendants were in possession of drug paraphernalia, as well as controlled substances (T. at 53, 56-58, 61, 89-90).

[3] Although the trial court correctly found that Intertech was contacted prior to defendant's arrest, a review of Officer Caldwell's testimony at the suppression hearing makes clear that the arresting officers received the Intertech information even prior to the stop of defendants' vehicle (T. at 33). In addition, Officer Caldwell learned that defendants paid cash and did not provide Intertech with their names at the time of purchase (R. at 7, para. #8; a copy of Officer's Caldwell's affidavit is attached hereto as Addendum A).

served on defendant Garza's residence. Numerous "listed" chemicals and drug paraphernalia were found.

[5] The Court finds that the stop made by the officers was appropriate and legal. Detective Fox had reasonable suspicion based on the circumstances taken as a whole. The defendants did not appear to be ordinary businessmen; they appeared to be nervous; they drove erratically, they used what appeared to be a personal vehicle; another car seemed to be acting in concert with defendants in an attempt to block the detective's pursuit; dispatch could not identify owner of the vehicle from the license plate number; the defendants were traveling more than 15 miles per hour in excess of the speed limit; the list of items purchased given to the officers while in pursuit were indicative of illegal activity. All of these factors taken together could easily create a reasonable and articulateble [sic] suspicion necessary to make an investigatory stop.

[6] Defendants were properly given their Miranda warnings. Even before the officers began investigatory questioning which does not require it, defendants were given Miranda warnings. Salt Lake City v. Carner, 664 P.2d 1168, 1170 (1983).

[7] The Court believes the search of the defendant's vehicle was proper. The list of items purchased from Intertech received while the officers were in pursuit, combined with the suspicious behavior of the defendants, and all attendant circumstances, created probable cause for [the] search of the vehicle. Even if the search was improper, the illegality would not affect the legality of the search warrant. The reasoning of the Court is that information relative to the evidence found in the vehicle was available to the officers in the form of a purchase order from Intertech.

[8] The chemicals and equipment found in the defendants' vehicle and on the purchase order from Intertech were commonly used together in the making of methamphetamine. In fact

> testimony indicated that the materials found lacked only one specialized piece of glassware and some other chemicals to allow one to easily make methamphetamine. Also, such equipment is rarely used in conjunction to make anything other than methamphetamine. The officers, being aware of the facts above, had probable cause to make the arrest.
>
> [9] The Court believes that there was sufficient probable cause for the issuance of the search warrant based on the conduct of the defendants and the purchase order from Intertech. This probable cause was enhanced by the statements of the defendants relative to the intended use of the supplies obtained from Intertech and the false information given relative to living quarters and identity.
>
> [10] For the reasons given above, the Court finds that the stop of the defendants' vehicle, the subsequent questioning of the defendants, and the issuance of the search warrant were proper. Therefore, the Court denies defendants[']motion to suppress.

(R. at 108-12).

SUMMARY OF ARGUMENT

Defendant's arguments in points I-III of his brief appear to focus on the trial court's assessment of reasonable suspicion for the initial stop of defendant's Bronco (Br. of App. at 10-13). Specifically, defendant broadly asserts that the stop was not supported by reasonable suspicion and therefore the subsequent arrest, seizure of contraband, investigatory questioning and warrant-based search of his residence were all impermissibly tainted (Br. of App. at 10-13). Defendant's unsubstantiated and erroneous allegations lack merit as well as record support.

The stop of defendant's vehicle was supported by a reasonable, articulable suspicion of criminal activity. Prior to the stop, investigating officers had observed defendant's and his companion's suspicious conduct, including the cash purchase of glassware and chemicals commonly used in the illegal manufacture of methamphetamine, as well as defendants' evasive and reckless driving. Notwithstanding the above, defendant challenges the subsequent search of the Bronco and police questioning solely on the alleged illegality of the initial stop. However, because the initial stop of defendant's vehicle was valid as based on reasonable suspicion, defendant's arguments are all equally without merit.

As for defendant's allegations concerning the sufficiency of Officer Caldwell's affidavit, a review of the record supports the magistrate's finding of probable cause for the issuance of the search warrant. Contrary to defendant's assertion, the affidavit clearly identified the "source" of Officer Caldwell's information which included his and other officers' observations of defendant in possession of drug paraphernalia. Moreover, because a police officer is generally presumed to be reliable, no special showing of the officers' reliability is required.

ARGUMENT

POINT I

THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED BY POLICE WAS PROPER.

In point I of his brief on appeal, defendant challenges the trial court's determination of reasonable suspicion in support of the investigatory stop of defendant's vehicle (Br. of App. at 5). Specifically, defendant asserts that the trial court erred in relying on the testimony of the officers in assessing the facts in support of its determination of reasonable suspicion for the stop (Br. of App. at 6-7, 10). Defendant further alleges that certain of the trial court's findings were erroneous, and that viewing the facts individually, they fail to support the trial court's ruling (Br. of App. at 6-9). Defendant's unsubstantiated and erroneous allegations are without merit.

Due to the trial court's "advantageous position in determining the factual basis for a motion to suppress," as well as to "observe witnesses' demeanor and other factors bearing on credibility," this Court will not upset a trial court's underlying factual findings unless they appear to be clearly erroneous. State v. Menke, 787 P.2d 537, 539 (Utah Ct. App. 1990) (citations omitted); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987). A trial court's findings are not clearly erroneous unless they are either against the clear weight of the evidence, or this Court reaches a "definite and firm conviction" that the trial court was mistaken. Id. (citations omitted). Accordingly,

this Court may not disturb the trial court's determination that reasonable suspicion existed unless that factual finding is clearly erroneous. State v. Mendoza, 748 P.2d 181, 183 (Utah 1987); (Utah 1987); State v. Grovier, 808 P.2d 133, 137 n.1 (Utah Ct. App. 1991); State v. Robinson, 797 P.2d 431, 435 (Utah Ct. App. 1990). But see State v. Carter, No. 900303-CA, slip op. at n.6 (Utah Ct. App. May 28, 1991) (amended opinion) (noting the Court's confusion on the proper standard of review - i.e., whether to treat the trial court's determination of the existence of reasonable suspicion as a question of fact or a conclusion of law).[4]

The "reasonable suspicion" test was first articulated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968). There the Court held that when "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot," he may make an investigative stop to confirm or dispel his

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[4] The State acknowledges that Utah is in the minority with Mendoza's requirement that the reasonable suspicion determination be reviewed as a finding of fact under a clearly erroneous standard. See, e.g., United States v. Hernandez - Alvarado, 891 F.2d 1414, 1416 (9th Cir. 1989) (setting forth the generally held view that whether reasonable suspicion exists is a mixed question of fact and law, and the trial court's ultimate conclusion regarding reasonable suspicion is a legal conclusion which is reviewed do novo). In Carter the State plans to seek certiorari review by the Utah Supreme Court and to ask that court for clarification of the standard of review for reasonable suspicion determinations. However, unless and until the Utah Supreme Court disavows Mendoza, that decision and its clearly erroneous standard of review are binding on this Court.

suspicion. Id. at 30.[5] A police officer who makes an investigative stop must be able to point to "specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. The Terry "reasonable suspicion" test has been codified in Utah Code Ann. § 77-7-15 (1990) which reads as follows:

> Any peace officer may stop any person in a public place when he has reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address, and an explanation of his actions.

This Court has interpreted the reasonable suspicion test and concluded that a "brief investigatory stop must be based on 'objective facts' that the 'individual is involved in criminal activity.'" State v. Holmes, 774 P.2d 506, 508 (Utah Ct. App. 1989) (citations omitted); Menke, 787 P.2d at 541.

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[5] This Court has previously noted that there are three constitutionally permissible levels of police encounters:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Johnson, 771 P.2d 326, 328 (Utah Ct. App. 1989), rev'd on other grounds, 805 P.2d 761 (Utah 1991).

The undisputed testimony of the officers at the motion to suppress hearing established that members of the North End Narcotics Strike Team were conducting an ongoing investigation into the establishment and operation of methamphetamine laboratories (T. at 9-13, 27, 46, 64-65). As part of that investigation, Officer Fox was conducting a visual surveillance of Intertech Trading in Orem, Utah on July 20, 1989 when he observed defendant and codefendant, April Garza, purchase glassware and chemicals (T. at 10-12, 32). Officer Fox believed defendant's behavior was suspiciously inconsistent with the actions of a legitimate businessman for several reasons, including defendant's casual dress and the absence of a company logo on the Bronco, as well as defendant's continuous scanning of the parking lot before lifting up the front of his shirt and reaching down his pants to remove something (T. at 10-12, 27-29). While Officer Fox watched, boxes depicting glass flasks (which appeared to be the same size and shape as glassware boxes Officer Fox had observed during previous investigations), as well as gallon containers of some type of chemical, were loaded into the back of the Bronco (T. at 11-13).

As the Bronco, driven by defendant, pulled out of the Intertech parking lot, Officer Fox attempted to get the license plate number of the vehicle (T. at 13). As he attempted to follow defendant's Bronco, Officer Fox was intercepted by a cream colored Datsun parked against traffic on the wrong side of the road (T. at 13). After forcing Officer Fox to brake in order to

avoid hitting it, the Datsun fell in behind the Bronco, in front of Officer Fox's vehicle (T. at 14). Upon reaching the I-15 northbound on-ramp, Officer Fox observed the Bronco fail to yield the right of way to another vehicle, forcing the other vehicle off the road into the barrow pit (T. at 14). At the same time, the Datsun slammed on its brakes and began weaving an S-pattern in front of Officer Fox's vehicle (T. at 14). As he continued following the Bronco northbound on I-15, Officer Fox observed several additional evasive tactics by defendant including speeding and illegal lane changes (T. at 15-17). He also observed defendant apparently attempt to signal the Datsun by putting bandanna-type flags out both windows of the Bronco (T. at 16). A subsequent registration check on both the Bronco and Datsun prior to the stop revealed that neither set of plates were "on file" (T. at 15).

Officer Caldwell, who had been called for back-up assistance, then contacted Intertech in an effort to determine what defendant and his companion had purchased (T. at 33, 96). Intertech informed Officer Caldwell what they had purchased, that they paid cash and that they had not given their names at the time of purchase (R. at 7, para. #8; see Addendum A). Based on information received from Intertech, as well as the personal observations of Officer Fox and defendant's reckless, evasive driving, Officer Caldwell stopped defendant's vehicle (T. at 35-38, 53, 61, 66). As he approached to talk to defendant, Officer Caldwell observed heating panels, heating units, glassware,

stirring rods, boxes of rubber gloves and color blast testing strips in plain view in the Bronco (T. at 69). Due to his experience in the investigation of controlled substances and their manufacture, Officer Caldwell was able to identify these objects as the type commonly used in the unlawful manufacture of methamphetamine (T. at 69-71).

Based on the foregoing, the stop of defendant's Bronco was supported by reasonable suspicion of criminal activity. As has been recognized by this Court, trained police officers "may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer. . . ." Menke, 787 P.2d at 541. Thus, an officer is "entitled to assess the facts in light of his experience." Id. (citations omitted). Moreover, contrary to defendant's apparent assertion, an officer's assessment of reasonable suspicion depends not on isolated facts, but upon the totality of the circumstances. State v. Baird, 763 P.2d 1214, 1216 (Utah Ct. App. 1988). Because the investigating officers in this case were able to articulate their suspicions and identify the facts upon which they were based, and because those suspicions were justified by the totality of the circumstances confronting the officers, this Court should affirm that the stop of defendant's vehicle was lawful. The court's reasonable suspicion determination was not clearly erroneous. Id.

POINT II

THE SEARCH OF DEFENDANT'S VEHICLE WAS PROPER UNDER THE FOURTH AMENDMENT.

As previously noted, defendant's arguments in points II-III concerning the subsequent search of the Bronco and police questioning, appear to be nothing more than an extenuation of his argument in point I, without sufficient factual development (Br. of App. at 10-11). Defendant appears to assert that the officers lacked sufficient reasonable suspicion to believe that defendant and his companion were engaged in illegal activity prior to stopping the Bronco; therefore, the subsequent vehicle search, as well as police questioning, were allegedly invalid and any contraband seized, or information gained therefrom, should be suppressed pursuant to Wong Sun v. United States, 371 U.S. 471 (1963). As before, defendant's broad and unsubstantiated allegations are without merit.

The trial court found that there was probable cause for the search of defendant's Bronco. Specifically, the Court stated:

> The Court believes the search of the defendants' vehicle was proper. The list of items purchased from Intertech received while the officers were in pursuit, combined with the suspicious behavior of the defendants, and all attendant circumstances, created probable cause for [sic] search of the vehicle.

(R. at 111, para. # 7). Although the trial court determined that the search of defendant's vehicle was supported by probable cause, the court's ruling does not expressly state which

exception to the warrant requirement of the fourth amendment it was applying. Admittedly, a search and seizure conducted without a warrant is unreasonable per se unless it falls within a recognized exception to the warrant requirement. State v. Bartley, 784 P.2d 1231, 1235 (Utah Ct. App. 1989) (citation omitted); Menke, 787 P.2d at 543. However, the search of defendant's vehicle was justified under the automobile exception to the warrant requirement first articulated in Carroll v. United States, 267 U.S. 132, 151-52 (1925). The Carroll Court determined that a warrantless search of an automobile was permissable if the searching officers "have probable cause to believe that the automobile contains either contraband or evidence of a crime and that they may be lost if not immediately seized." State v. Droneburg, 781 P.2d 1303, 1305 (Utah Ct. App. 1989) (quoting State v. Christensen, 676 P.2d 408, 411 (Utah 1984)). See Chambers v. Maroney, 399 U.S. 42 (1975). See also California v. Carney, 471 U.S. 386 (1985); United States v. Ross, 456 U.S. 798 (1982); State v. Dorsey, 731 P.2d 1085, 1087-88 (Utah 1986).[6] Thus, where as here, a vehicle is lawfully stopped based on reasonable suspicion of criminal activity, and

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[6] Because defendant has neither raised nor requested a separate state constitutional analysis under article I, section 14 of the Utah Constitution, the State's argument is based solely on the fourth amendment of the United States Constitution and thus; does not address the plurality opinion in State v. Larocco, 794 P.2d 460 (Utah 1990) which held that under article I, section 14 of the Utah Constitution, warrantless searches are permissible "only where they satisfy their traditional justification, namely, to protect the safety of police or the public or to prevent the destruction of evidence." Id. at 469-70.

officers observe contraband which may be lost if not immediately seized, the Carroll doctrine would justify an immediate and warrantless search. State v. Limb, 581 P.2d 142, 144 (Utah 1978). See Christensen, 676 P.2d at 411. See also State v. Hygh, 711 P.2d 264, 267 (Utah 1985).

Reviewing all the information available to the officers in light of the circumstances as they existed at the time of the search, the evidence shows that the officers had ample information available to establish probable cause that there was contraband in the vehicle and to justify an immediate warrantless search of the Bronco.

Officers Caldwell and Fox testified that they observed drug paraphernalia and chemicals in plain view in the back of defendant's Bronco at the time of the stop (T. at 19, 69). Specifically, Officer Fox testified that he observed gallon containers and glass flasks of chemical in an open box in the back of the Bronco (T. at 19). Officer Caldwell testified that he observed glassware, heating panels and units, stirring rods, color blast testing strips and rubber gloves (T. at 69). These observations, together with the suspicious behavior of defendant and his companion at the time they purchased the glassware and chemicals, the information from Intertech concerning the purchased items, as well as defendant's evasive and reckless driving prior to the stop, all support the trial court's apparent determination that there was probable cause to associate the drug paraphernalia and chemicals observed in the Bronco with the

suspected illegal manufacture of methamphetamine. See Menke, 787 P.2d at 544 (contraband seized was the anticipated fruit of the suspected theft). Thus, in summary, defendant was lawfully stopped and investigated, probable cause existed for the search of the Bronco, and the warrantless search was justified under the automobile exception. Therefore, the trial court did not err in denying defendant's motion to suppress and this Court should affirm the lower court's ruling on this ground. See State v. Gray, 717 P.2d 1313, 1316 (Utah 1986) (Court may affirm trial court's decision to admit evidence on any proper ground).

As for defendant's allegation in point III, he vaguely asserts that information obtained through police questioning was tainted and therefore "inadmissable" because it followed the alleged illegal stop of defendant's Bronco (Br. of App. at 11). Significantly, defendant does not attack the trial court's findings in regard to the propriety of police questioning following his arrest. The trial court specifically held that

> [t]he officers on the scene [] arrested the defendants and gave the appropriate Miranda warnings. Defendants were interviewed separately concerning what they had purchased and the purpose for which they had purchased it. They gave the officers different stories--but both indicated that they were purchasing the equipment for someone else.
>
> . . .
>
> Defendants were properly given their Miranda warnings. Even before the officers began investigatory questioning which does not require it, defendants were given Miranda warnings.

(R. at 109, 111, supra pp. 5-7 para. ## 3, 6).

As previously noted in point I, it is the State's position that the stop of defendant's Bronco was valid pursuant to the officers' reasonable suspicion of criminal activity; thus, subsequent events were not tainted thereby. Because defendant has not presented additional argument, legal analysis, authority or record support for his allegations, the State will not further address defendant's argument on this point. Moreover, defendant's minimal and conclusory analysis does not merit review by this Court. State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Sterger, 808 P.2d 122, 125 n.2 (Utah Ct. App. 1991) (court declined to rule on defendant's arguments due in part to his failure to provide any meaningful analysis).

POINT III

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR THE SEARCH OF DEFENDANT'S RESIDENCE.

In point IV of his brief defendant appears to assert that Officer Caldwell's affidavit in support of a search warrant for defendant's residence was insufficient to establish probable cause (Br. of App. at 11-12). Specifically, defendant asserts that "[n]othing contained in either the affidavit or in the transcript of the hearing reveals any claim to a source, whether confidential or otherwise, which claims to have seen any contraband or other evidence of criminal conduct" (Br. of App. at 13). Defendant's meritless allegations are unsupported by the record.

It is well established that a finding of "probable cause supported by oath or affirmation" is required for the issuance of a search warrant. State v. Brown, 798 P.2d 284, 285 (Utah Ct. App. 1990) (citations omitted). It is equally clear that whether an affidavit in support of a search warrant established probable cause for the issuance of a search warrant is determined by the totality of the circumstances. State v. Ayala, 762 P.2d 1107, 1109 (Utah Ct. App. 1988) (citing Illinois v. Gates, 462 U.S. 213 (1983), and State v. Anderton, 668 P.2d 1258 (Utah 1983) (adopting Gates analysis)), cert. denied, 773 P.2d 45 (Utah 1989). In determining whether the issuing magistrate reached a practical, common sense decision that there is "probable cause to believe that evidence is located in a particular place," the reviewing court does not conduct a "de novo probable-cause determination;" rather, the reviewing court determines whether the evidence viewed as a whole" provides a "'substantial basis' for the finding of probable cause." Id. at 1109-10 (citing Massachusetts v. Upton, 466 U.S. 727, 732-733 (1984)); Brown, 798 P.2d at 286 (citing Gates, 462 U.S. at 230, State v. Hansen, 732 P.2d 127, 130 (Utah 1987), and State v. Droneburg, 781 P.2d 1303, 1306 (Utah Ct. App. 1989)). In so determining, the reviewing court should pay "great deference to the magistrate's decision." State v. Babbell, 770 P.2d 987, 991 (Utah 1989). A review of Officer Caldwell's affidavit accordingly reveals a "substantial basis" for the magistrate's

determination of probable cause for the issuance of a search warrant for defendant's residence.

As previously noted, defendant's primary challenge to the affidavit appears to be that it failed to identify a "source" for the information contained therein (Br. of App. at 13). However, contrary to defendant's assertion, the "source" of Officer Caldwell's information was clearly stated in the affidavit (R. at 70-72, see Addendum A). Specifically, Officer Caldwell relied upon his own and Officer Fox's investigation and observations of defendant's conduct (R. at 70-72, see Addendum A).[7] As set forth in the affidavit, Officer Fox observed defendant and his companion load drug paraphernalia into their vehicle at Intertech (R. at 72, see Addendum A). He then relayed that information to Officer Caldwell in a request for backup assistance, who then contacted Intertech to find out what defendant had purchased (R. at 71-72, see Addendum A). Based on the information he received from Intertech, as well as defendant's reckless and evasive driving, Officer Caldwell determined that defendants had purchased prohibited drug paraphernalia with the intent to manufacture the controlled substances (R. at 71, see Addendum A).

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[7] Because a police officer is generally presumed to be reliable, no special showing of either Officer Caldwell's or Officer Fox's reliability is required here. 3 W. LaFave, Search and Seizure § 3.5(a), p. 3 (1987) (citing United States v. Ventresca, 380 U.S. 102 (1965)). Cf. State v. Miller, 740 P.2d 1363, 1366 (Utah Ct. App.) (average neighbor witness is not the type of informant in need of independent proof of reliability or veracity) (citations omitted), cert. denied, 765 P.2d 1277 (Utah 1987).

As further stated in his affidavit, Officer Caldwell subsequently interviewed both defendant and his companion and received conflicting stories concerning an individual who allegedly asked them to purchase the paraphernalia on his behalf (R. at 70-71, see Addendum A). Officer Caldwell also ran a criminal history on codefendant Garza and learned that she had previously been arrested for conspiracy to manufacture methamphetamine and conspiracy to distribute and possess methamphetamine. See State v. Stromberg, 783 P.2d 54, 57 (Utah Ct. App.) (probable cause determination supported by information that defendant had previously been convicted of a similar offense), cert. denied, 795 P.2d 1138 (Utah 1990). Based on the foregoing information, Officer Caldwell determined that defendant and his companion were "not being honest" with him and that, contrary to their assertions, they were in fact themselves manufacturing and distributing methamphetamine in their residence and that a search of that residence would reveal additional paraphernalia (R. at 70, see Addendum A). Thus, contrary to defendant's assertion, Officer Caldwell's affidavit provided a substantial basis for the magistrate's determination of probable cause to believe that contraband would be discovered inside defendant's residence. Therefore, this Court should affirm the trial court's denial of defendant's motion to suppress on this ground.

CONCLUSION

Based on the foregoing reasons, the order of the trial court denying defendant's motion to suppress should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of July, 1991.

R. PAUL VAN DAM
Attorney General

Marian Decker

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to Jay Fitt, attorney for appellant, 835 East 1400 South, Orem, Utah 84058, this 10th day of July, 1991.

Marian Decker

ADDENDUM A

CIRCUIT COURT, AMERICAN FORK DEPARTMENT

UTAH COUNTY, STATE OF UTAH

****

STATE OF UTAH,	)	PROBABLE CAUSE
	)	AFFIDAVIT IN SUPPORT
-VS-	)	OF AND MOTION FOR A
	)	SEARCH WARRANT
OCCUPANTS OF 5600 South	)	
1291 East	)	
Murray, Utah	)	CASE NO._____
	)	
	)	

****

STATE OF UTAH,)
:
COUNTY OF UTAH)

1. Gary Caldwell, being first duly sworn on oath, deposes and says;

2. That I am a police officer for American Fork Police Department, American Fork, Utah, Utah County, State of Utah.

3. That I have been a police officer for the past ten years. I have been working with a narcotics task force as a supervisor for the past two years. I have experience in serving as many as 100 search warrants during the past eight years. I have arrested many people for narcotics violations during the same period of time

4. I have been to narcotics training classes during the past two years to train me in working with different types of narcotics cases. One of the classes dealt with methamphetimines and how people operate labs. I have been trained in all aspects of the operation of and the way people operate in order to set a lab up.

5. In the past three months I have had experience in arresting as many as twelve persons who have been involved in manufacturing methamphetimine labs. I have found and located meth labs in houses and vehicles. I have seen the equipment used and the method of operation.

6. On July 20th, 1989 at 1400 hours, Lt. Fox of the American Fork Police Department observed a blue 1980 Bronco with Utah Plates # 023 DAD pick up items from Intertech Trading in Orem, Utah at 170 South Mtn. Way Dr. The itmes he could see being loaded appeared to be paraphrenlia items used in a methamphetimine lab. Lt. Fox contacted your affiant at the American Fork Police Dept. and told me what he had seen. He was asked to follow the vehicle until I could determine who the person picking the itmes up was.

7 I was able to determine that the items picked up were items listed on the House Bill # 3 as paraphrenlia items. I believe that based on the actions of the two suspects in the vehicle and the items purchased by cash from Intertech Trading that the two persons knew that the items were going or were probably going to a meth lab.

8. The actions were that the two suspects hid the itmes in the rear of the vehicle they were driving. They did not give any names at the time of purchase. They picked up items listed on House Bill #3 and other items we believe are used to manu facture meth. They had some one other than the registered owner drive the vehicle.

9. At approximately 1400 hours, your affiant stopped the suspect vehicle and advised the driver of his rights. He told your affiar that he was paid to come to Orem by a man he knows as "Fatso" and pick up the paraphrenlia items. He told me that he was to take the items to Salt Lake Cith to a motel, rent a room and call the guy at a pay phone booth and he would come pick up the chemicals and glass ware. he told me that he was given $540.00 cash to pay for the items.

10. Your affiant interviewed the female suspect at the American Fork Police Department and she told your affiant that she met a man in a business in Salt Lake City two months ago. She told me that the man she knows as Mike Shriver is from California and he gave her $2,000.00 in cash to go to Orem to pick the chemicals and paraphrenlia items up. She said they were to take the items to Salt Lake to a Motel and rent it for three days and put the key on top of the pay phone outside.The suspect was to call her at her house and she would tell him where the key was and he would pick the items up.

11. Your affiant believes that there is probable cause to believe that both suspects were in possession of drug paraphrenlia with intent to manufacture Methamphetamines. Your affiant ran a criminal history on April Garza and found that she has been in prison in California and possible Oregon. I found that she had family in Oregon. I learned that she has been arrested for Conspiracy to Manufacture Methamphetamines Conspracy to Dist. and Poss Methamphetamines . She also has a arrest for assault on a police officer with a firearm.

12. Your affiant interviewed April and Leonard, the two suspects and both of them gave your affiant an address in Salt Lake City. April gave your affiant this address also and said she lived here too. I asked her which address she really lived at and she gave me the 5600 South 1291 East #6. I was able to have her give me her phone number. She stated the number was the number registered to the stated address. I called Mary at Mtn. Bell and she told me that the phone number given to your affiant was registered to April at 5600 South 1291 East #6 in Murray,Utah

13. Your affiant sent Det. Blackhurst and Det. Taylor from Orem Police to Murray to the stated address, and they located a 280 Z car which is registered to April. The car is parked right in front of the stated residence. Your affiant was told by Blackhurst that the mail box in front ofthe residence had the name of April and Leonard on it.

14. Your affiant believes that the two listed suspects have not been honest with me and that they in fact may the ones making or manufacturing or distributing methamphetamines. That they in fact live at the stated address at 5600 South 1291 East #6.

15. Your affiant believes that the two suspects are or may be in possession of controlled substances in the residence which have been manufactured by glass ware and items the same as we seized. Your affiant believes that the two suspects will be in possession of items used to distribute or manufacture controlled substances, and that they will be in possession of items used to identify them and their sources for the sale or distribution of controlled substances.

16. Your affiant believes that because of the evidence found already and the criminal history of April and because of the type of items involved in the use and manufacturing of methamphetimines that there is a serious danger to the officers serving the search warrant. April is not in the house, but in the Utah County Jail, however, anyone could be in the stated residence.

17. Therefore, Your affiant respectfully request a warrant to search the stated residence and to enter the residence without first giving notice of our presence and intent to enter.

D. Caldwell
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20 DAY OF JULY 1989.
TIME: 15:24

/s/ John Backlund
CIRCUIT COURT JUDGE

ADDENDUM C

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
CHARLENE ANN HOLMES	:	Case No. 880168-CA Category No. 2
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction imposed for Unlawful Possession of a Controlled Substance, a class A misdemeanor, in violation of Utah Code Ann. §58-37-8 (1953 as amended) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding.

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STATUTES AND CONSTITUTIONAL PROVISIONS CITED

STATEMENT OF ISSUES

1. Did the officers' detention of Ms. Holmes violate the fourth amendment to the United States Constitution?

2. Did the officers' detention of Ms. Holmes violate article I, section 14 of the Utah Constitution?

3. Even if the officers lawfully stopped the vehicle in which Ms. Holmes was a passenger, did they nevertheless violate the fourth amendment in seizing the roll of paper towels and its contents since the facts did not fit within the plain view exception?

TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, Section 14 of the Utah Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not

> be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Code Ann. §77-7-15 (1953 as amended) provides:

> 77-7-15. Authority of peace officer to stop and question suspect -- Grounds. A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this court pursuant to Utah Code Ann. §77-35-26(b)(1)(1953 as amended) and Utah Code Ann.§78-2a-3(2)(f), whereby the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment of conviction for any crime other than a first degree or capital felony.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
CHARLENE ANN HOLMES	:	Case No. 880168-CA Category No. 2
Defendant/Appellant	:	

STATEMENT OF THE CASE

This is an appeal from a judgment and conviction for Attempted Unlawful Possession of a Controlled Substance, a class A misdemeanor, in violation of U.C.A. §58-37-8 (1953 as amended). The judge found Ms. Holmes guilty on January 15, 1988, on the basis of evidence received during a hearing on a Motion to Suppress Evidence held November 20, 1987, in the Third Judicial District Court, in and for the Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding. See Addendum A.

STATEMENT OF FACTS

On the evening of September 17, 1987, Lieutenant William Gray and Sergeant William A. Shelton of the Salt Lake City Police Department were on a plainclothes assignment patrolling in an unmarked police car (T 26).

At approximately 8:30 p.m., Sgt. Shelton and Lt. Gray first noted a woman as she stood on the sidewalk on the west side of 1200 South State Street talking to the male occupant of a pickup truck. Officers Gray and Shelton, in their unmarked car, pulled in behind the truck which then drove away. The woman, whom the officers later learned was Charlene Ann Holmes, proceeded to walk southbound (T. 5, 26-27).

As Ms. Holmes continued walking south, Officers Gray and Shelton observed a car pull into the Veterinary Hospital parking lot, stopping at the entrance crossing the sidewalk. Ms. Holmes turned and talked to the driver. After a short conversation, the car departed and Ms. Holmes continued walking south before crossing the street at the southwest corner of 1300 South and State Street. She proceeded to walk south to a service station, Wayne's Car Care Center (T. 6-7, 27).

At Wayne's Car Care Center, the officers observed a male in a small pickup truck stop and briefly converse with Ms. Holmes. Ms. Holmes then walked south and as she neared the southern end of the service station, the second of the three cars which the officers had earlier seen stop Ms. Holmes pulled into the station. The driver again conversed with Ms. Holmes and shortly thereafter she got into the car (T. 7-8).

The officers followed the car as it headed southbound on State Street. At 1700 South, the car turned east and entered the west parking lot at South High School. The car exited only seconds

later on to 1700 South and proceeded eastbound to 300 East, entering the east parking lot at South High School. The car emerged moments later and returned to 1700 South. Driving westbound, the car turned at 200 East, made a U-turn and reentered 1700 South westbound to State Street. The car then turned north onto State Street (T. 9-10, 28-29).

At approximately 1500 South and State Street, Lt. Gray and Sgt. Shelton pulled the car over. Prior to stopping the car, neither officer had viewed Ms. Holmes engage in any illegal activity nor did they observe the driver of the car violate any traffic ordinances (T. 10, 29).

Sgt. Shelton testified that he and Lieutenant Gray stopped the car because they figured that a prostitution deal had been made between the driver of the car and Ms. Holmes. Sergeant Shelton speculated that the deal had been made, but that the occupants of the car had discovered that he and Lt. Gray were police officers and were thus returning to State Street to drop off Ms. Holmes (T. 10,29).

Sgt. Shelton, as head of the vice squad, had had no previous contacts with Ms. Holmes and had no information that she was a prostitute (T. 17). He testified that his belief that a prostitution deal had been made was based on his observations that there is a very high area of prostitution between approximately 800 South and 2100 South on State Street (T. 5-6), that Ms. Holmes strolled at a very low pace, turning back and looking toward

traffic, that she had brief conversations with three different males (T. 21), and, that the route the car had taken was suspicious (T. 10).

After stopping the car, Sgt. Shelton approached the driver's side of the car and asked the driver to step out and talk to him (T. 11). Sergeant Shelton did not take the driver's name, nor did he note or record the model and make of the car or its license plate number (T. 24).

Lt. Gray walked up and stood directly behind the car door on the passenger side where Ms. Holmes was seated (T. 30). Lt. Gray testified that from his vantage point, he witnessed Ms. Holmes remove a roll of paper towels from her purse and attempt to stuff them between the car console and the seat. Lt. Gray opened the door and asked Ms. Holmes for the roll of towels. He reached in and removed the towels and unrolled them on the roof of the car. He stated the towels contained two syringes, a spoon, and two small packets of mayonnaise (T. 30-31).

Lt. Gray arrested Ms. Holmes for possession of a controlled substance (T. 32). The officers released the driver of the car.

SUMMARY OF ARGUMENTS

Ms. Holmes was seized when officers stopped the car in which she was a passenger for questioning as to whether she and the driver had made a prostitution deal. Because the officers lacked a

reasonable suspicion to justify such detention, Ms. Holmes' rights under the fourth amendment to the United States Constitution were violated and the evidence seized should have been suppressed.

The seizure of Ms. Holmes also violated her rights under article I, section 14 of the Utah Constitution and the statutory requirements of Utah Code Ann. §77-7-15 (1953 as amended).

Even if the officers lawfully stopped the vehicle in which Ms. Holmes was a passenger, the officers nevertheless violated the fourth amendment prohibition against unreasonable search and seizure when they seized a roll of paper towels which were not visibly linked to criminal activity, and unrolled them without obtaining a warrant.

ARGUMENT

POINT I: THE DETENTION OF MS. HOLMES VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Court in Terry v. Ohio, 392 U.S. 1 (1968), referred to the Fourth Amendment's personal privacy and security safeguards as "sacred," with no right "more carefully guarded, by the common law, than the right of every individual to the possession and

control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Id., at 8-9 [quoting Union Pacific Railroad Co. v. Botsford, 141 U.S. 250 (1891)]. The protection afforded by the Fourth Amendment extends to this nation's citizens when they are on public sidewalks and when they are in their automobiles. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

A limited exception to the general probable cause requirement was created by the United States Supreme Court in Terry when it held that under appropriate circumstances a brief detention of a person, absent probable cause to arrest, is permissible under the Fourth Amendment. See also, Florida v. Royer, 460 U.S. 491 (1983). The Terry Court instructs that this limited exception is tailored to balance the government's interest in effective law enforcement against the individual's liberty, privacy and personal security. However, in recognizing the essential protections guaranteed by the Fourth Amendment, the Supreme Court has stressed that in balancing these competing considerations, a central concern has been "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Brown v. Texas, 443 U.S. 47, 51 (1979).

Thus, in justifying a particular detention, an officer must be able to point to specific articulable facts which, when viewed under an objective standard, create a reasonable suspicion

that the defendant has committed or is about to commit a crime. Terry v. Ohio, 392 U.S. 1 (1968); Florida v. Royer, 460 U.S. 491. This Court has reiterated the Terry Court's insistence on such a standard, cautioning that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple 'good faith on the part of the arresting officer is not enough....". State v. Trujillo, 739 P.2d 85, 88 (Utah App. 1987) (quoting Terry, 392 U.S. at 21-22). This constitutionally mandated "reasonable suspicion" necessary to justify detention has been codified in Utah law at Section 77-7-15 Utah Code Ann. (1953). Trujillo,, 739 P.2d at 88.

The search and seizure limitations of the Fourth Amendment apply to "investigatory stops" or "seizures" that are less than official arrests. Terry, 392 U.S. at 16-17. The Utah Supreme Court has held that the stopping of a vehicle and the detention of its occupants constitutes a "seizure" within the meaning of the fourth and fourteenth amendments. State v. Cole, 674 P.2d 119, 123 (Utah 1983); Prouse, 440 U.S. at 653. Therefore, Defendant Charlene Holmes' fourth amendment rights were implicated when Officers Gray and Shelton stopped the car in which she was a passenger and detained her. In this case, the information relied on by the officers in a decision to detain the defendant did not amount to the constitutionally mandated reasonable suspicion.

It is Sergeant Shelton's testimony that he relied on four factors to justify a stop and detention of Charlene Holmes.

1. The officers observed Ms. Holmes on the block of 1200 South State Street which, they believed based on their past experience, is part of a very high area of prostitution extending from approximately 800 South to 2100 South on State Street.

2. Ms. Holmes strolled at a very slow pace and turned back to look toward traffic.

3. Ms. Holmes had short, brief conversations with three different males who were seated in their respective automobiles and then got into one of the automobiles.

4. The "suspicious" route of the car in which Ms. Holmes was a passenger.

It is Sergeant Shelton's testimony that he relied on two factors to justify the stop and detention of Charlene Holmes.

(a) Ms. Holmes was in an area frequented by prostitutes.

(b) Ms. Holmes talked briefly to two different males in their automobiles on two separate occasions, and she conversed briefly with a third male in whose car she was subsequently stopped and detained by the officers.

The factors enumerated by the officers, singly or in combination, did not rise to the level indicated in the case law from Utah, the United States Supreme Court, and other jurisdictions, to justify the detention of Ms. Holmes under the fourth amendment.

Factor 1(a). Both officers testified that they took an interest in Charlene Holmes because of their belief that the area in which they first observed her was a "very high prostitution area."

Although there has been little opportunity to analyze the "high prostitution area" factor in Utah case law, it is most analogous to the "high crime area" factor which was recently presented to this Court in State v. Trujillo, 739 P.2d 85 (Utah App. 1987). In Trujillo, this Court determined that an officer's decision to stop the defendant was based initially on two factors, one of which was the high crime factor in the area. This Court held that the seizure of the defendant was unconstitutional -- the detention of the defendant being unreasonable within the meaning of the fourth amendment.

In State v. Carpena, 714 P.2d 674 (Utah 1986), the officer cited the "high crime area" factor as one of the bases for his suspicion of criminal behavior on the part of the defendants. The Utah Supreme Court's per curiam decision did not address the issue specifically, but since the Court held that the information known to the officer did not justify the stop, it can be inferred that the high crime area factor was insufficient to justify the challenged stop. See also State v. Belanger, 677 P.2d 781 (Wash. App. 1984).

In State v. Whittenback, 621 P.2d 103 (Utah 1980), the defendants were seen in a laundromat located in a high crime area at 1:00 a.m. The officer recognized the defendants from a previous

criminal encounter during which a bag of coins was discovered in their possession. In this instance, the Court found the initial stop leading to the arrest as valid. However, Whittenback is readily distinguishable from the case now before the Court since the officer had previously apprehended the defendants with a bag of coins in their possession and there had been a rash of burglaries in the area of the laundromat.

In the case now before the Court, no such previous contact existed. Sergeant Shelton testified that he had not had any previous contacts with Ms. Holmes and that as the head of the vice squad, he had no information that she was a prostitute (T.17). Consequently, there is no relationship established between Ms. Holmes' prior activities and her presence in a "high prostitution area."

In People v. Bower, 24 Cal.3d 638, 645, 597 P.2d 115, 119 (Cal. 1979), the California Supreme Court in addressing the "high crime area" factor recognized that many citizens shop, work, play, transact business, visit, or live in areas that have high crime rates. The Court noted that "[t]he spectrum of legitimate human behavior occurs every day in so-called high crime areas. As a result, this court has appraised this factor with caution and has been reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circumstances into circumstances justifying the seizure of an individual." Id. (citations omitted). The court's critical analysis of the high crime area

factor is consistent with the view that the attributes of a general social phenomena should not be imputed to an individual.

In State v. Sery, Case No. 860333-CA, slip op., (July 27, 1988) this Court analogized Mr. Sery's arrival from Florida as a basis for a reasonable suspicion to the testimony in State v. Mendoza, 748 P.2d 181 (Utah 1987), that Interstate 15 was often used by illegal aliens from Mexico. Id. at 18. This Court found that the fact that a person embarked from a flight which originated in Florida did not amount to an objective fact upon which a reasonable suspicion could be based just as the fact that a person was traveling on I-15 did not support a reasonable suspicion in Mendoza. This Court noted:

> In Mendoza, the court considered it unlikely that illegal alien transporters comprised a significant portion of I-15 traffic. It seems equally unlikely that drug couriers comprise a significant portion of the travelers through Salt Lake International airport, even of those whose flight originated in Florida.

Id. at 18. Applying the analysis of Mendoza and Sery to the instant case, it seems just as unlikely that persons who have entered into illegal prostitution agreements comprise a significant portion of the people on State Street, and information that a woman was walking on State Street between 2100 South and 800 South is not a fact upon which a constitutionally sound reasonable suspicion that a woman was involved in criminal activity could be based.

In the case before the Court, the defendant, a female, was walking down the street in an area deemed by Officers Shelton

and Gray to be a "very high prostitution area"; an area, as described by the officers, which encompasses approximately fifteen city blocks, daily the site of heavy pedestrian and automobile traffic. A woman should not be subject to seizure simply because she is present in an area which has a high incidence of prostitution. That an area has a high occurrence of prostitution does not qualify itself as a specific articulable fact imputing a reasonable suspicion of criminality to an individual woman.

Factor 2. Sergeant Shelton alone testified that the defendant's walk and accompanying backward glance were significant factors in his decision to stop and detain her. The allegedly suspicious walk of Ms. Holmes was no more than her walking at a very slow pace, or "strolling" and looking back towards traffic -- as described by Sergeant Shelton. (T.21)

Although this Court has "acknowledge[d] that a trained law enforcement officer may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer," and furthermore, "[t]he officer is entitled to assess the facts in light of his experience." Trujillo, 739 P.2d at 88-89; United States v. Mendenhall, 446 U.S. 544, 564-565 (1980), this Court has also re-emphasized that it is "imperative that the facts be judged against an objective standard[ ]" which would "warrant a [person] of reasonable caution in the belief that the action taken was appropriate[.]" Trujillo, 739 P.2d at 88. (Emphasis added.)

Sergeant Shelton's interpretation of Ms. Holmes' walk and alleged head movements is purely subjective. There is no objective standard which one could possibly utilize to determine whether one was strolling, walking at a very slow pace, at just a slow pace, at a slow pace, at a medium pace, at a fast pace. Assuming arguendo that there is probative value in such a determination, it would fail the objective test as enunciated by the Terry Court and followed by this Court.

Indeed, the subjective nature of Sergeant Shelton's observation of Ms. Holmes' walk and the conclusions derived therefrom, is illustrated by the testimony of his partner that evening. Lieutenant Gray stated that although in his opinion she walked a little slowly, there was otherwise nothing unusual about her walk. The following exchange occurred during cross-examination of Lieutenant Gray:

Q. Did you see her (Ms. Holmes) walk down State Street?

A. Yes

Q. Did she walk in a normal fashion?

A. She walked a little slow, in my opinion, but other than that, nothing unusual.

Q. Okay, no flirting gestures?

A. Not that I observed.

(T.35) Lieutenant Gray's opinion that there was nothing unusual about Ms. Holmes' walk and his lack of reliance on the manner in which Ms.Holmes walked down the street to justify the determination

to stop and detain Ms. Holmes is strengthened by his twenty years experience in police work.

The unordinary "pace" and "meaning" of Ms. Holmes' walk is entirely subjective and not an objective indication of criminal intent to be used to justify police detention. To find otherwise could conceivably subject every law-abiding citizen to the "unfettered discretion" of law enforcement officials, in violation of the fourth amendment.

Factor 3b. Both officers testified that their interest in Ms. Holmes was aroused because they observed her having short, brief conversations with three different males seated in their respective automobiles and that Ms. Holmes got into one of the automobiles.

Ms. Holmes' "brief conversations" as a basis for the formation of an articulable suspicion on the officers' part is similarly subject to the objective difficulties discussed above. As to these brief conversations, Sergeant Shelton testified that as Ms. Holmes walked down the street, three separate cars pulled up alongside her and they briefly conversed. Sergeant Shelton testified in regard to these conversations that Ms. Holmes did not motion to any car or wave the cars over; Ms. Holmes did not yell at the cars; nor did they observe Ms. Holmes initiate the conversations. (T. 18-20).

Sergeant Shelton further testified that he could not hear anything that was said in the conversations; he did not know the

identity of Ms. Holmes or the identity of any of the three different drivers; he did not know what occurred in the conversations prior to Ms. Holmes' ride in the car. Id. The result is that the officers lacked an objective basis to formulate an articulable suspicion arising from separate conversations between four unknown individuals. According to the officers' testimony, at no time did they possess any knowledge as to the purpose, context, or content of the conversations "observed" between Charlene Holmes and the three individuals.

Ms. Holmes was engaged in short conversations with three men in cars as she walked down State Street, an occurrence which is not at all peculiar as pointed out by Sergeant Shelton during cross-examination:

> Q. You [Sergeant Shelton] have driven up and down State Street a number of times, I take it?
>
> A. A lot, yes.
>
> Q. It is not unusual at all on any night of the week to see a young woman talking to other people in cars, is it?
>
> A. No.
>
> Q. Happens hundreds of times from 3rd South to 21st South on State Street every night of the week?
>
> A. I can't talk about 21st to 3rd. I am not really that familiar with that part of the street. That is out of my jurisdiction.

Q. Well, within your jurisdiction, whatever that is. It is the kind of thing that happens hundreds of times a night on State Street, does it not?

A. Yes, it does.

(T. 20-21)

Objectively, there is nothing to distinguish the brief moments of conversation between the defendant and the three drivers from "the kind of thing that happens hundred of times a night on State Street." (Id.) The fourth amendment acts essentially as a standard of "reasonableness" in order to guard "the privacy and security of individuals against arbitrary invasions" by government officials, including law enforcement agents. Prouse, 440 U.S. at 653-654.

In Brown v. Texas, 443 U.S. at 52, the Court concluded that there were no adequate grounds to form a reasonable suspicion that the defendant was engaged in criminal conduct because, "[i]n short, the [defendant's] activity was no different from the activity of other pedestrians in that neighborhood." Id.; See Trujillo, 739 P.2d at 90. There was no knowledge provided to the officers from Ms. Holmes' alleged conversations by which one could reasonably differentiate Ms. Holmes from other pedestrians in the area. Evaluated under an objective test, the alleged conversations between Ms. Holmes and the three drivers do not give rise to a reasonable suspicion.

Sergeant Shelton stated that the route taken by the car in which Ms. Holmes was a passenger contributed to his decision to stop the vehicle and detain the passengers. Sergeant Shelton testified that the car's route also included momentarily pulling into two different parking lots. Sergeant Shelton further testified that he did not observe the car make any traffic violations (T. 22). On the other hand, Lieutenant Gray's testimony did not specify that the route of the automobile in question was relied upon by him to justify the stop and detention of Ms. Holmes (T. 29, 36-37).

The Utah Supreme Court in State v. Carpena, 714 P.2d 674 (Utah 1986) was presented with the stop of an automobile in which one of the factors claimed to justify the stop and detention was the manner in which the car was driven. The officer observed the slow moving car, with out-of-state license plates at 3:00 a.m. in an area in which a recent rash of burglaries had occurred. The Court's analysis took into account the fact that the officer had not observed any criminal or traffic offense while he followed the car for three blocks. It was the Court's finding that the officer had no objective facts on which to base a reasonable suspicion that the car's two occupants were involved in criminal activity.

In State v. Mendoza, 748 P.2d 181 (Utah, 1987), the Utah Supreme Court directly addressed the "route of travel" factor stating that "it had little probative value in determining if the officers had a reasonable suspicion to stop the vehicle." Id. at 4. Furthermore, the Court noted that the "erratic driving behavior"

(the subsequent lane change and rapid deceleration at the approach of the patrol car) could not be interpreted to give rise to a suspicion that the occupants of the car were engaged in illegal activity. Id. at 4-5.

In Sery, the Court compared the State's reliance on Mr. Sery's behavior in sitting down in a phone booth twice then standing up and looking over the partition, and subsequently leaving the booth by a "strange" path to the State's reliance on an "erratic" driving pattern in Mendoza. Sery, slip. op. at 19. This Court determined that Mr. Sery's behavior did not amount to an objective fact upon which a reasonable suspicion could be based, pointing out that the officer "did not say how this behavior varies from that of any other arriving passenger . . .". Id.

In the present case, the officers observed the car in which Ms. Holmes was a passenger in an area of heavy traffic. Neither officer observed any criminal behavior before or after the car turned from the south bound direction on State Street to the north bound direction on State Street when they stopped the car. The officers did not articulate any objective facts to support the speculation that the manner in which the car was driven served to provide a reasonable suspicion that a "prostitution deal" had been made between Ms. Holmes and the driver of the car or that the car was driven any differently from other cars cruising State Street. In fact, Sergeant Shelton testified the he pulled the car over because he "figured" that a prostitution deal had been made and that the

driver had decided that they were police and he was going to return and drop off Ms. Holmes. Sergeant Shelton acknowledged that his scenario was conjecture on his part (T. 10). In addition the car was unmarked and the officers were in plain clothes suggesting it was difficult for the occupants of the car to have known they were being followed by officers if, in fact, they realized that they were being followed at all.[1] Furthermore, it is indicative of the nature of the stop that the officers released the driver without getting his name, the model and make of the car, and the license plate number (T. 24).

The four factors relied upon by the officers to justify the stop and detention of Ms. Holmes, when analyzed singly, do not constitute specific articulable facts which create a reasonable suspicion that a crime had taken place or was about to take place. Furthermore, nothing concerning the cumulation of the factors makes them more persuasive in support of a conclusion that the officers' suspicion was reasonable under the fourth amendment. The specified factors do not "mysteriously become imbued with an aura of guilt merely by viewing them in their totality. Four times zero, in arithmetic, still equals zero." People v. Loewen 35 Cal.3d 117, 672 P.2d 436, 444 (Cal. 1983) (quoting People v. Gale 9 Cal. 3d 788, 511 P.2d 1204 (Cal. 1973) (dis.opn. of Mosk, J.))

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[1] The State offered no testimony that either Ms. Holmes or the driver turned around to look at them or repeatedly checked the rear view mirror.

Because the officers' detention of Ms. Holmes was not supported by a reasonable suspicion based on articulable facts, the detention violated the fourth amendment to the United States Constitution. It is well settled that when the seizure and detention of the defendant is without the evidentiary justification required by the fourth amendment of the Constitution, the resulting evidence from the misconduct must be excluded from criminal trials. Terry, 392 U.S. at 15. See also Trujillo, 739 P.2d. 85 Utah App. 1988).

Accordingly, the evidence obtained from Ms. Holmes should have been suppressed. Ms. Holmes respectfully requests that such evidence be suppressed, her conviction reversed, and the matter remanded for dismissal or a new trial without the illegally seized evidence.

POINT II. THE DETENTION OF MS. HOLMES VIOLATED UTAH CONSTITUTIONAL PROVISIONS.

Article I, Section 14 of the Utah constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah is free to analyze search and seizure cases under article I, section 14 of the Utah Constitution differently from case

law which is based on an interpretation of the fourth amendment to the United States constitution. In State v. Hansen, 732 P.2d 127 (Utah 1987), the Utah Supreme Court inferred that a separate analysis of search and seizure cases under the Utah Constitution, article I, section 14 is warranted. Id. at 129 n.1. See also State v. Earl, 716 P.2d 803 (Utah 1986).

In State v. Myrick, 688 P.2d 151, 153 (Wash. 1984), the Washington Supreme Court characterized the United States Supreme Court's interpretation of the federal constitution as "guidance" in construing the Washington Constitution. The Myrick Court stated that, "[w]hile we may turn to the Supreme Court's interpretation of the United States Constitution for guidance in establishing a hierarchy of values and principles under the Washington Constitution, we rely, in the final analysis, upon our own legal foundations in determining its scope and effect." Id. Illustratively, the Washington Supreme Court found that the Washington Constitution provided greater protections against unreasonable searches and seizures by police to the people of Washington than did the federal constitution. State v. Jackson, 688 P.2d 136, 143 (Wash. 1984).

Similarly, the Alaska Supreme Court determined that it should "construe Alaska's constitutional provisions such as Article I, Section 14 as affording additional rights to those granted by the United States Supreme Court under the federal constitution." State v. Jones, 706 P.2d 317, 321 (Alaska 1985). In Jones, the Court

approved a more rigorous test to determine probable cause under Alaska law than is required under the federal constitution.

Assuming arguendo that the factors relied upon by the officers supported a detention of Ms. Holmes not in violation of the Fourth Amendment to the United States constitution, this Court may impose a more rigorous test to determine what constitutes reasonable suspicion under the Utah constitution. The facts of the present case should not support a justifiable intrusion of the protections granted to Ms. Holmes under article I, section 14 of the Utah constitution and thus the evidence that flowed from the unlawful seizure should have been suppressed.

POINT III. EVEN IF THE STOP WERE LAWFUL, THE OFFICERS VIOLATED MS. HOLMES' RIGHT AGAINST UNLAWFUL SEARCH AND SEIZURE WHEN THEY SEIZED THE ROLL OF PAPER TOWELS AND UNWRAPPED IT.

Assuming arguendo that the officers made a rightful stop and that consequently Lieutenant Gray was in a position where he was entitled to be, evidence obtained was nevertheless the result of an illegal search and seizure.

In State v. Cole, 674 P.2d 119 (Utah 1983), the Utah Supreme Court held that "warrantless seizures and searches are per se unreasonable unless the exigencies of the situation justify an exception." Id. at 123, citing Katz v. United States, 389 U.S. 347 (1967); see also State v. Romero, 660 P.2d 715 (Utah 1983); State v. Lee, 633 P.2d 48 (Utah 1981). One exception specified by the

Cole Court to the warrant requirement is the doctrine that "objects within the plain view of an officer from a position where he is entitled to be are not the subject of an unlawful search." Cole, 674 P.2d at 123 [citations omitted].

The "plain view doctrine" requires (1) lawful presence of the officer which is incident to a lawful intrusion; (2) evidence which is in plain view; and (3) evidence which is clearly incriminating. State v. Kelly, 718 P.2d 385, 389 (Utah 1986); State v. Romero, 660 P.2d 715 (Utah 1983). The Kelly Court further explained that the third requirement that evidence be "clearly incriminating" means that there is "probable cause to associate the property with criminal activity." Kelly, 718 P.2d at 390 (quoting Texas v. Brown, 460 U.S. 730, 741-742 (1983) (plurality opinion)). Probable cause requires that an officer "have a reasonable belief that the object viewed may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct. . . " Texas v. Brown, 460 U.S. at 742.

The object viewed by Lieutenant Gray consisted of a roll of paper towels (T. 31). In his testimony, Lieutenant Gray attached special significance to the paper towels and a roll of paper towels alone does not provide probable cause to associate the towels with criminal behavior. The only basis for a finding that the paper towels were "clearly incriminating evidence" provided by Lieutenant Gray to justify his seizure was that he "felt she (Ms. Holmes) was attempting to hide something from us." Id. The inference from the

officer's testimony is that the paper towels became "clearly incriminating evidence" from his observation of Ms. Holmes removing the towels from her purse and "stuffing" them between a console and the car sear (T. 30).

In State v. Trujillo, 739 P.2d 85 (Utah App. 1987), this Court examined a "furtive movement" subsequent to the approach of a police officer. In Trujillo, the officer saw the defendant shift his knapsack from his side to his front in a way considered by the officer to be an effort of concealment. When the officer approached, the defendant placed the knapsack next to a garbage can, an act which the officer regarded as an effort to "stash" the knapsack.

This Court noted that the officer did not observe Mr. Trujillo engage in any criminal conduct nor did the officer inquire about the "suspicious" placement of the knapsack before subjecting Mr. Trujillo to the search which yielded a concealed weapon. Furthermore, this Court pointed out that the officer never articulated what concerned him about the knapsack. Id. at 86-89.

In the present case, the officers did not observe Ms. Holmes engage in any criminal conduct, nor did Lieutenant Gray inquire about the "suspicious" placement of the paper towels before reaching inside the car and taking them. Similar to the facts of Trujillo, the officer only articulated a suspicion that Ms. Holmes was "attempting to hide something from us" to justify the seizure and search of the paper towels (T. 31).

The United States Supreme Court's opinion in Texas v. Brown 460 U.S. 730 (1983), suggests that an officer must articulate more than a subjective interpretation of a furtive movement in order to justify a seizure. In Brown, the officer testified that his seizure of a balloon from the defendant was based on his knowledge that balloons tied in the manner of the one seized were frequently used to carry narcotics. The officer's testimony of illicit drug practices was corroborated by a police department chemist. In addition, the seizure was based on other contents of the car which further suggested possession of illicit substances. Id. at 742-743. In the instant case, where the visible item itself was not tied to criminal activity and the officer articulated only a subjective interpretation of an action, the seizure of the roll of paper towels and all articles within was not justified.

Assuming arguendo that the seizure of the rolled up paper towel was legal, the officer effected an illegal search by unrolling the paper towels on the roof of the car in order to ascertain its contents. A closed container may not be opened without a warrant, even when the container is in plain view and the officer has probable cause to believe contraband is concealed within. United States v. Chadwick, 433 U.S. 1 (1977). In his concurrence in Brown, joined by Justices Brennan and Marshall, Justice Stevens wrote:

> "if there is probable cause to believe it contains contraband, the owner's possesory interest in the container must yield to society's interest in making sure that the contraband does not vanish during the time

> it would take to obtain a warrant. The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot. Once the container is in custody, there is no risk that evidence will be destroyed Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate. (Emphasis added.)

Brown, 460 U.S. at 749-50 (Stevens, J., concurring).

Nor do the contents of the rolled paper towel in the present case fall within the distinctive configuration variation of the plain view doctrine. Pursuant to the "distinctive configuration variation" the contents of a container are considered to be within the searching officer's view because the distinctive configuration of the container proclaims its contents. State v. Cole, 674 P.2d 119, 124 (Utah 1983); Robbins v. California, 453 U.S. 420 (1981). The Cole Court found that a gun case inferred its contents due to its distinctive configuration. Cole, 674 P.2d at 124; Arkansas v. Sanders, 442 U.S. 753 (1979).

The contents of the rolled paper towel could not be ascertained by its configuration. A rolled paper towel could contain an infinite variety of items, if anything at all. Thus, the rolled paper towel does not invoke the distinctive configuration variation of the plain view doctrine. Therefore, Lieutenant Gray, even if justified in the seizure of the paper towels, effected an illegal search by not then obtaining a warrant to ascertain the

contents of the rolled towel as was within his power and which is required by the fourth amendment of the United States Constitution.

Accordingly, the evidence obtained from within the rolled paper towels should be suppressed and Ms. Holmes requests that her conviction be overturned and the case remanded for a new trial absent the illegally seized evidence, or dismissal.

CONCLUSION

For any and all of the foregoing reasons, Mr. Holmes requests this Court to reverse the conviction and the trial court's ruling on the motion to suppress and remand this case to the trial court with an order to suppress the evidence, and dismiss the charges or provide for a new trial without such evidence.

Respectfully submitted this 23 day of AUgust, 1988.

JAMES C. BRADSHAW
Attorney for Defendant/Appellant

JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme court, State Capitol, Salt Lake City, Utah 84114 and four copies to the Attorney General's Office 236 State Capitol Building, Salt Lake City, Utah, 84114, this 23 day of August, 1988.

JOAN C. WATT

DELIVERED by _____ this 23 day of August, 1988.

ADDENDUM A

JAMES C. BRADSHAW, #3768
Attorney for Defendant
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION TO SUPPRESS EVIDENCE AND NOTICE OF HEARING
Plaintiff,	:	
-v-	:	
CHARLENE HOLMES,	:	Case No. CR87-1379 JUDGE JAMES S. SAWAYA
Defendant,	:	

The defendant, CHARLENE HOLMES, by and through her attorney of record, JAMES C. BRADSHAW, hereby moves this court to suppress all evidence obtained by the State in this case subsequent to the time that the defendant was illegally stopped and detained by the police officers on September 17, 1987 in violation of her State and Federal constitutional right to be free from illegal searches and seizures.

Therefore, the defendant requests that this court suppress all evidence in the above entitled case.

DATED this 12th day of November, 1987.

Respectfully Submitted,

JAMES C. BRADSHAW
Attorney for Defendant

NOTICE OF HEARING

TO THE COUNTY ATTORNEY AND THE CLERK OF THE COURT:

Please take notice that the above entitled hearing will be heard before the Honorable JAMES S. SAWAYA at his courtroom on the 20th day of November, 1987, at the hour of 9:00 a.m. Please govern yourselves accordingly.

DATED this 18th day of November, 1987.

JAMES C. BRADSHAW
Attorney for Defendant

DELIVERED a copy of the foregoing to the office of the County Attorney, 231 East Fourth South, Salt Lake City, Utah 84111 this 23rd day of November, 1987.

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